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Federalism-Based Limitations on Congressional Power: An Overview

Updated January 31, 2023

Congressional Research Service

<https://crsreports.congress.gov>

R45323

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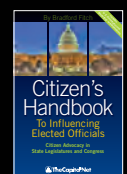
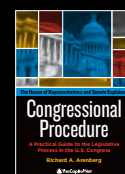
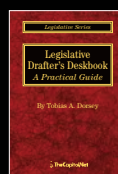


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Federalism-Based Limitations on Congressional Power: An Overview

The U.S. Constitution establishes a system of dual sovereignty between the states and the federal government. Although the Supremacy Clause of the Constitution designates federal law as supreme to state law, other provisions of the Constitution prohibit the national government from enacting laws that either exceed federal power or improperly impinge upon state sovereignty. The various principles that delineate the proper boundaries between the powers of the federal and state governments are often referred to by the shorthand “federalism.” The Constitution’s federalism-based restrictions on the national government’s power may inform Congress’s work in numerous areas of law in which the states and the federal government share authority.

The Constitution imposes federalism-based limitations on Congress in two basic ways. First, the Constitution restricts Congress’s authority by the scope of the various powers it grants the federal government. The Constitution explicitly grants Congress a set of carefully defined enumerated powers, while reserving most other legislative powers to the states, or to the people. As a result, Congress may not enact any legislation that exceeds the limits of its enumerated powers. However, Congress’s enumerated powers may authorize the federal government to enact legislation that affects the scope of power exercised by the states. For instance, subject to certain restrictions, Congress may use its taxing and spending powers to encourage states to undertake certain actions, even when Congress lacks the constitutional authority to undertake those actions directly. Similarly, the Supreme Court has interpreted the Constitution’s Commerce Clause to afford Congress authority to regulate purely intrastate economic activities that substantially affect interstate commerce in the aggregate. Congress may also enact legislation necessary to implement international treaties, even when Congress lacks authority in the area in the absence of the treaty. Under constitutional amendments ratified shortly after the Civil War, Congress may in some cases directly regulate the states to prevent them from depriving people of their constitutional rights. Finally, the Necessary and Proper Clause of the Constitution augments Congress’s enumerated powers by empowering the federal government to enact laws that are appropriate and plainly adapted to achieve a legitimate end within its enumerated powers.

Second, even when Congress has legislative authority to act in a particular area pursuant to its enumerated powers, its action may still violate general federalism principles found elsewhere in the Constitution. The Supreme Court has recognized federalism doctrines that affirmatively prohibit Congress from taking certain actions that intrude on state sovereignty, even if otherwise authorized under an enumerated power. Although the specific textual source of these doctrines is not always clear, the Court has often described them as based on the federal constitutional structure, as confirmed by the Tenth and Eleventh Amendments. For example, the Supreme Court has held that the national government may not “commandeer” the states’ authority for its own purposes by forcing a state’s legislature or executive to implement federal commands. Similarly, the principle of state sovereign immunity—which limits the circumstances in which a state may be sued in court without its consent—constrains Congress’s ability to create federal causes of action against states or state officials. The Supreme Court has also recognized a principle of “equal sovereignty” that may limit Congress’s ability to subject some states to unequal regulatory burdens without sufficient justification.

R45323

January 31, 2023

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The Constitution establishes a “system of dual sovereignty between the States and the Federal Government,”¹ with each state having its own government, “endowed with all the functions essential to separate and independent existence.”² Although the Constitution grants the national government power over many areas,³ the Tenth Amendment reserves the powers not delegated by the Constitution to the national government “to the States respectively, or to the people.”⁴ Thus, under the Constitution’s structure, the powers granted to the national government are “few and defined,” whereas the powers remaining in the states are “numerous and indefinite.”⁵

When Congress acts pursuant to a valid grant of constitutional authority, the Supremacy Clause makes its enactments the “supreme Law of the Land.”⁶ Valid federal laws therefore supersede inconsistent or conflicting state laws, when Congress so intends.⁷ In this way, Congress has authority to “impose its will on the States” when acting within its constitutional powers.⁸ However, the federal government may not exceed “the powers granted it under the Constitution,”⁹ and states “possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.”¹⁰ As a result, “States retain broad autonomy in structuring their governments and pursuing legislative objectives.”¹¹

The various principles that delineate the proper boundaries between the powers of the federal and state governments are collectively known as “federalism.”¹² The Supreme Court has described federalism doctrines as serving several different purposes. Federalism is said to be a “check on abuses of government power,” because “a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”¹³ Although federalism doctrines operate to “preserve[] the integrity, dignity, and residual sovereignty of the States,”¹⁴ that is not the “end in itself.”¹⁵ Rather, the Supreme Court’s decisions maintain that

¹ *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

² *Lane Cnty. v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869), *superseded by statute as recognized in* *Leitch v. Dep’t of Revenue*, 9 Or. Tax 256 (1982).

³ *See, e.g.*, U.S. CONST. art. I, § 8.

⁴ U.S. CONST. amend. X.

⁵ THE FEDERALIST NO. 45 (James Madison); *accord* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

⁶ *See* U.S. CONST. art. VI, cl. 2.

⁷ *See generally* Cong. Rsch. Serv., *ArtVI.C2.1 Overview of Supremacy Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE_00013395/ (last visited Nov. 11, 2022); CRS Report R45825, *Federal Preemption: A Legal Primer*, by Jay B. Sykes and Nicole Vanatko.

⁸ *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

⁹ *Id.*

¹⁰ *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

¹¹ *Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013).

¹² *See Federalism*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “federalism” as “the legal relationship and distribution of power ... between the federal government and the state governments.”). In modern usage, the Supreme Court has typically invoked “federalism” doctrines in cases involving solicitude for state sovereignty. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37, 44 (1971); *Gregory*, 501 U.S. at 458–60. There is a certain historical irony in this usage in that, during the debates over the ratification of the Constitution, the Federalists (as opposed to the anti-Federalists) were generally supporters of a stronger national government. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426 n.9 (1987).

¹³ *Gregory*, 501 U.S. at 458.

¹⁴ *Bond v. United States*, 564 U.S. 211, 221 (2011).

¹⁵ *New York v. United States*, 505 U.S. 144, 181 (1992).

federalism enhances freedom by securing to the people “the liberties that derive from the diffusion of sovereign power.”¹⁶

Federalism has informed modern understandings of the limits on Congress’s authority in many areas. For instance, the Supreme Court has identified limits on Congress’s enumerated powers, such as its power to regulate interstate commerce under Article I, Section 8 of the Constitution.¹⁷ The Court has also recognized other federalism-based doctrines that constrain Congress’s power, such as the anticommandeering doctrine—that is, the prohibition against the national government demanding that a state use its own governmental system to implement federal commands.¹⁸ These and other federalism-based limitations on Congress’s powers are important considerations whenever Congress legislates, making federalism a “closely watched” and “ever-present” issue for Congress.¹⁹

This report provides a broad overview of the various legal doctrines that inform the boundaries of Congress’s authority vis-à-vis the states under the Constitution. The report begins by addressing several general principles that undergird modern legal debates over federalism. It then discusses the limitations on the exercise of Congress’s various enumerated powers, focusing on frequently used powers such as Congress’s authority to appropriate and spend money, regulate interstate and foreign commerce, implement international treaties, enforce the Civil War Amendments, and rely on the Necessary and Proper Clause. The report next reviews federalism doctrines that affirmatively prohibit Congress from taking certain actions that intrude on state sovereignty, even if otherwise authorized under an enumerated power. These doctrines—such as the anticommandeering doctrine, state sovereign immunity, and the equal sovereignty doctrine—may constrain Congress’s power to act even when Congress has legislative authority in a particular area.

Conceptions of Federalism

Before discussing the various federalism-based limits on Congress’s powers, it is helpful to note the debate over how these limitations are enforced, and by whom. Broadly speaking, the Supreme Court in the modern era has advanced two “competing conceptions of federalism.”²⁰ Exemplifying one viewpoint is the Court’s 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*, which held that the Constitution does not insulate state governments from the reach of generally applicable federal laws enacted under the Commerce Clause.²¹ *Garcia* reasoned that the “principal and basic limit” on Congress’s powers vis-à-vis the states is “the built-in restraints that our system provides through state participation in federal governmental action.”²² Put another way, *Garcia* concluded that “political processes” (i.e., Congress and the

¹⁶ *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (Blackmun, J., dissenting)).

¹⁷ *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 557 (1995) (noting that the commerce power is “subject to outer limits”); *NFIB v. Sebelius*, 567 U.S. 519, 558 (2012) (opinion of Roberts, C.J.). *See also infra* “Commerce Clause.”

¹⁸ *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 935 (1997) (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”). *See also infra* “The Anticommandeering Doctrine.”

¹⁹ *See* CHRISTOPHER P. BANKS & JOHN C. BLAKEMAN, *THE U.S. SUPREME COURT AND NEW FEDERALISM: FROM THE REHNQUIST TO THE ROBERTS COURT 2* (2012).

²⁰ Erwin Chemerinsky, *The Assumptions of Federalism*, 58 *STAN. L. REV.* 1763, 1768 (2006).

²¹ *See* 469 U.S. 528, 547 (1985).

²² *Id.* at 556.

President’s discretion) and not the courts, would be the primary means to enforce the federalism-based limits on Congress’s powers.²³

The political-process conception of federalism embraced in *Garcia* has largely been supplanted in a series of Supreme Court decisions beginning in the 1990s and continuing to the present.²⁴ The currently prevailing view is that the judiciary has an important role in safeguarding state governments from federal overreach.²⁵ For instance, in 1995, the Court in *United States v. Lopez* struck down a federal law that forbade possessing a gun within 1,000 feet of a school, holding that the law exceeded Congress’s powers under the Commerce Clause.²⁶ In so concluding, *Lopez* described the federalism-based limitations on Congress’s commerce power as limits that “‘the Court has ample power’ to enforce.”²⁷

Current doctrine has thus recognized that the judiciary can police the limits of Congress’s powers vis-à-vis the states. Nonetheless, as Justice Anthony Kennedy expressed in his concurrence in *Lopez*, the political branches continue to have a central role in recognizing the limits on Congress’s powers in areas potentially intruding on the sovereignty of state governments:

Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance. For these reasons, it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance.... The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.²⁸

The federalism-based limits on Congress’s power discussed in this report thus are more than just factors for Congress to consider in drafting legislation to ensure that a court does not invalidate it on federalism grounds. Federalism may also be an important background principle for legislators to consider to ensure that the political process respects and maintains the appropriate constitutional balance between state and federal authority.²⁹

Limitations on Congress’s Enumerated Powers

The Constitution confers certain enumerated powers upon Congress,³⁰ many of which are not specifically discussed in this report. Some of Congress’s powers—such as those under the

²³ *Id.*

²⁴ See generally Cong. Rsch. Serv., *Amdt10.4.1 Modern Tenth Amendment Jurisprudence Generally*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt10-4-1/ALDE_00013626/ (last visited Nov. 11, 2022).

²⁵ See Chemerinsky, *supra* note 20, at 1768–69 (describing the shifting views on the Court concerning federalism).

²⁶ See 514 U.S. 549, 552 (1995); see also *New York v. United States*, 505 U.S. 144, 149 (1992).

²⁷ *Lopez*, 514 U.S. at 557 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968), *overruled on other grounds* by *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)).

²⁸ *Id.* at 577–78.

²⁹ *Id.*

³⁰ See generally U.S. CONST. art. I, § 8.

Spending Clause,³¹ the Commerce Clause,³² the Treaty Power,³³ the Civil War Amendments,³⁴ and the Necessary and Proper Clause³⁵—are particularly significant in delineating the allocation of power between the federal government and the states. The sections below discuss the limitations the Constitution imposes on Congress’s exercise of those particular powers.

Spending Clause

The Spending Clause empowers Congress to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”³⁶ The breadth of the Spending Clause was the subject of much debate for the first 150 years of the nation’s history. Under one view—favored by James Madison—Congress’s Spending Clause powers were narrow. Madison contended that those authorities extended only to spending in connection with Congress’s other enumerated powers, such as the power to regulate interstate commerce.³⁷ In contrast, others—most prominently, Alexander Hamilton—viewed the Spending Clause as conferring an independent power for Congress to raise and spend money to promote the national welfare.³⁸

The Hamiltonian position ultimately prevailed. In 1936, the Supreme Court held in *United States v. Butler* that Congress’s Spending Clause authority is not limited to expenditures carrying out its other enumerated powers.³⁹ The Court thus recognized that Congress has broad constitutional authority to spend money in pursuit of its goals.

Although the Supreme Court has rejected the narrow Madisonian view of the Spending Clause, it has acknowledged other limitations on Congress’s spending power. One limitation has proved to be quite minimal in practice. Based on the text of the Spending Clause, the Court has explained that Congress’s spending power is limited to expenditures in pursuit of the “general Welfare.”⁴⁰ Despite articulating this theoretical limitation, the Court has never deployed it to invalidate a federal expenditure.⁴¹ Rather, the Court has explained that courts should generally defer to

³¹ See *infra* “Spending Clause.”

³² See *infra* “Commerce Clause.”

³³ See *infra* “Treaty Power.”

³⁴ See *infra* “Congress’s Powers Under the Civil War Amendments.”

³⁵ See *infra* “Necessary and Proper Clause.”

³⁶ U.S. CONST. art. I, § 8, cl. 1. Because the Clause empowers Congress to “lay and collect Taxes,” the Spending Clause is sometimes called the “Taxing and Spending Clause.” See, e.g., David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 581 (2017). Congress’s power to tax may be limited by other provisions of the Constitution that are not directly related to principles of federalism. See *United States v. Kahriger*, 345 U.S. 22, 28 (1953) (“[T]he constitutional restraints on taxing are few. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity.” (internal citations and quotations omitted)), *overruled in part on other grounds by* *Marchetti v. United States*, 390 U.S. 39, 54 (1968).

³⁷ See 30 ANNALS OF CONG. 1059–62 (1817) (Madison Veto Message); Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), *reprinted in* 2 THE FOUNDERS’ CONSTITUTION 453, 456 (Philip B. Kurland & Ralph Lerner eds., 1987).

³⁸ Alexander Hamilton, *Report on Manufacturers* (Dec. 5, 1791), *reprinted in* 2 THE FOUNDERS’ CONSTITUTION 453, 456 (Philip B. Kurland & Ralph Lerner eds., 1987).

³⁹ 297 U.S. 1, 66 (1936).

⁴⁰ See U.S. CONST. art. I, § 8, cl. 1.

⁴¹ *NFIB v. Sebelius*, 567 U.S. 519, 674 (2012) (Scalia, J., dissenting).

Congress’s assessment of the “general welfare” and only strike down Spending Clause legislation when it represents “a display of arbitrary power.”⁴²

Other limitations on the Spending Clause have proven more consequential. These limits—several of which are grounded in the Tenth Amendment—constrain Congress’s ability to impose conditions on the receipt of federal funds by states or localities. Specifically, if Congress attaches conditions to federal funding for states and localities, those conditions must be unambiguous, related to the purpose of the relevant spending, consistent with other constitutional provisions, and noncoercive.⁴³ Each of these limitations on Congress’s spending power is discussed below.

Clear Notice

The Supreme Court has held that, if Congress intends to place conditions on the receipt of federal funds by states or localities, it must do so “unambiguously.”⁴⁴ The Court announced this “clear notice” rule in 1981 in *Pennhurst State School & Hospital v. Halderman*, which involved a statute that funded state services for the developmentally disabled.⁴⁵ By accepting the funds, states were required to make assurances that they would protect the “rights” of disabled persons “consistent with” the statute’s “findings” section.⁴⁶ That section provided that developmentally disabled persons “have a right to appropriate treatment,” and that such treatment “should be provided in the setting that is least restrictive of ... personal liberty.”⁴⁷

In *Pennhurst*, the Supreme Court held that states were not required to abide by these findings as a condition of receiving the relevant federal funds. In reaching this conclusion, the Court likened Spending Clause legislation to contracts between the federal government and the states.⁴⁸ If states are to “voluntarily and knowingly” accept such contracts, the Court explained, Congress must clearly articulate their terms.⁴⁹ The Court ultimately determined that the statute at issue in *Pennhurst* did not unambiguously condition receipt of the relevant funds on compliance with its “findings” section.⁵⁰ As a result, recipients of those funds were not required to provide disabled persons with “appropriate treatment” in a setting that was “least restrictive” of their personal liberties.⁵¹

Pennhurst suggested—and later cases have confirmed—that the clear-notice rule is a constitutional requirement and not merely a principle of statutory interpretation.⁵²

⁴² *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (holding that scheme of benefits under the Social Security Act was valid exercise of Congress’s power to tax and spend in aid of the general welfare).

⁴³ For a more detailed overview of these limits, see CRS Report R46827, *Funding Conditions: Constitutional Limits on Congress’s Spending Power*, by Victoria L. Killion.

⁴⁴ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

⁴⁵ *Id.*

⁴⁶ *Id.* at 12–14.

⁴⁷ *Id.* at 13.

⁴⁸ *Id.* at 18–27.

⁴⁹ *Id.* at 17.

⁵⁰ *Id.* at 18–27.

⁵¹ *Id.*

⁵² See *id.* at 17; CRS Report R46827, *supra* note 43, at 7.

Relatedness

The Supreme Court has also stated that conditions on federal funds must relate to the purpose of the relevant spending.⁵³ However, this “relatedness” requirement is not demanding. The Supreme Court has never invalidated a spending condition on relatedness grounds,⁵⁴ and lower courts have generally applied deferential standards in evaluating relatedness challenges. The Ninth Circuit,⁵⁵ for example, has explained that a funding condition must bear only “some relationship” to the purpose of federal spending—a requirement that it described as a “low bar.”⁵⁶ The Tenth Circuit has similarly described the required relationship as “one of reasonableness or minimum rationality.”⁵⁷

The relatedness limitation is not strict, but it is not wholly toothless. During the Trump Administration, two federal district courts relied on the relatedness requirement to invalidate conditions on the receipt of certain Department of Justice grants.⁵⁸ The grants at issue supported state and local criminal-justice initiatives, whereas the conditions required recipients to cooperate with federal immigration-enforcement efforts in various ways. Two district courts concluded that immigration enforcement was not sufficiently related to the relevant criminal-justice initiatives, and struck down certain conditions on the grants for that reason (among others).⁵⁹ (One of those decisions was later affirmed on other grounds.)⁶⁰ These opinions suggest that the relatedness limitation may impose a meaningful constraint in certain cases.

Independent Constitutional Bar

Constitutional provisions other than the Spending Clause can also provide an “independent bar” to conditional grants of federal funds.⁶¹ For example, the Supreme Court has explained that Congress cannot use its Spending Clause authority to induce states to engage in unconstitutional activities, such as discriminating on the basis of race or inflicting cruel and unusual punishment.⁶²

The “Anti-Coercion” Doctrine

Finally, the Supreme Court has explained that conditions on federal funding cannot be unduly coercive. This limitation, according to the Court, is “critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal

⁵³ *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

⁵⁴ *See City of Los Angeles v. Barr*, 929 F.3d 1163, 1175 (9th Cir. 2019).

⁵⁵ This report periodically references decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Ninth Circuit) refer to the U.S. Court of Appeals for that particular circuit.

⁵⁶ *Barr*, 929 F.3d at 1175 (citation omitted).

⁵⁷ *Kansas v. United States*, 214 F.3d 1196, 1199 (10th Cir. 2000).

⁵⁸ *Colorado v. Dep’t of Just.*, 455 F. Supp. 3d 1034, 1055 (D. Colo. 2020); *City & Cnty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 961 (N.D. Cal. 2018), *affirmed in part, vacated in part by City & Cnty. of San Francisco v. Barr*, 965 F.3d 753 (9th Cir. 2020); *see also City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 644 (E.D. Pa. 2017) (explaining that the relatedness issue was a “close question” in litigation concerning immigration-related conditions on the relevant grants).

⁵⁹ *Colorado*, 455 F. Supp. 3d at 1055; *City & Cnty. of San Francisco*, 349 F. Supp. 3d at 961.

⁶⁰ *City & Cnty. of San Francisco*, 965 F.3d 753.

⁶¹ *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

⁶² *Id.* at 210.

system,”⁶³ as “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”⁶⁴ In this sense, the anti-coercion doctrine can be understood as the application of the anticommandeering principle to the Spending Clause context.⁶⁵

In its 1987 decision in *South Dakota v. Dole*, the Supreme Court recognized that certain financial inducements “might be so coercive as to pass the point at which pressure turns into compulsion.”⁶⁶ In *Dole*, the Court rejected a challenge to a law that would have stripped states of certain federal highway funds if they refused to adopt the national minimum drinking age.⁶⁷ The Court determined that the law—which would cost noncompliant states 5% of otherwise-obtainable highway funds—presented states with “relatively mild encouragement,” but did not unconstitutionally coerce them into accepting federal policy.⁶⁸

By contrast, the Court held that a federal law crossed the line between acceptable encouragement and impermissible coercion in its 2012 decision in *NFIB v. Sebelius*.⁶⁹ There, the Court held that Congress violated the anti-coercion doctrine by withholding all Medicaid funding from states that did not accept the Affordable Care Act’s Medicaid expansion.⁷⁰ In a plurality opinion, Chief Justice Roberts highlighted the fact that Medicaid had become a “substantial part” of many state budgets,⁷¹ observing that Medicaid constituted more than 10% of most states’ revenue, whereas the highway funds at issue in *Dole* represented less than 0.5% of South Dakota’s budget.⁷² By threatening to strip states of such significant sums, Chief Justice Roberts explained, the condition effectively operated as a “gun to the head” that unconstitutionally coerced states into accepting the Medicaid expansion.⁷³

Commerce Clause

Perhaps the most consequential of Congress’s enumerated powers is the Commerce Clause,⁷⁴ which grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁷⁵ The Commerce Clause thereby authorizes Congress to regulate a wide range of economic and social activities.⁷⁶ The Supreme Court’s views on the

⁶³ *NFIB v. Sebelius*, 567 U.S. 519, 577 (2012) (opinion of Roberts, C.J.)

⁶⁴ *Id.* (quoting *New York v. United States*, 505 U.S. 144, 162 (1992)).

⁶⁵ See *infra* “The Anticommandeering Doctrine.”

⁶⁶ *Dole*, 483 U.S. at 211 (internal quotation marks and citation omitted).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 567 U.S. 519 (2012).

⁷⁰ *Id.* at 575–89 (Roberts, C.J.); *id.* at 671–89 (Scalia, J., dissenting).

⁷¹ *Id.* at 542, 580–82 (Roberts, C.J.).

⁷² *Id.*

⁷³ *Id.* at 581 (Roberts, C.J.).

⁷⁴ See ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 174 (1997) (arguing that, of the eighteen clauses enumerated in Article I, Section 8 detailing Congress’s powers, “none is more important” than the Commerce Clause); EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 54 (13th ed. 1973) (“The commerce clause comprises, however, not only the direct source of the most important peace-time powers of the National Government; it is also, except for the Due Process of Law Clause of Amendment XIV, the most important basis for judicial review in limitation of State power.”).

⁷⁵ U.S. CONST. art. I, § 8, cl. 3.

⁷⁶ See, e.g., Paul Boudreaux, *A Case for Recognizing Unenumerated Powers of Congress*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 551, 555 (2006) (“Th[e] authority to regulate interstate commerce ... forms the constitutional basis for nearly all

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breadth of Congress's commerce powers have varied throughout the nation's history.⁷⁷ In the late 19th century and early 20th century, the Court embraced a relatively narrow view of the Commerce Clause, holding that Congress lacked the constitutional authority to regulate subjects such as manufacturing⁷⁸ or child labor.⁷⁹ Beginning in 1937 until nearly the end of the 20th century, by contrast, the Court adopted a seemingly boundless view of the Commerce Clause, going so far in the 1942 case of *Wickard v. Filburn* to hold that Congress may validly regulate the production of homegrown wheat intended wholly for personal consumption.⁸⁰ The *Wickard* Court reasoned that the Commerce Clause authorizes Congress to regulate activities having a substantial aggregate effect on interstate commerce and that Congress reasonably concluded homegrown wheat had such an effect.⁸¹ In response to this shift in the Court's Commerce Clause jurisprudence, Congress invoked its commerce powers as the constitutional basis for federal legislation on many subjects throughout the 20th century,⁸² including criminal,⁸³ civil rights,⁸⁴ and environmental statutes.⁸⁵

In a series of rulings beginning in the mid-1990s, the Court held that certain federal legislation exceeded Congress's commerce power.⁸⁶ The Supreme Court's 1995 opinion in *United States v. Lopez* sets forth the modern test for determining whether a federal statute exceeds the scope of Congress's Commerce Clause authority.⁸⁷ The Court held in *Lopez* that there are "three broad categories of activity that Congress may regulate under its commerce power."⁸⁸ These are (1) "channels of interstate commerce"; (2) "instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "activities that substantially affect interstate commerce."⁸⁹

modern social legislation, from the civil rights laws, to employment statutes, to environmental legislation.").

⁷⁷ *NFIB v. Sebelius*, 567 U.S. 519, 549 (2012) (Roberts, C.J.) ("The path of our Commerce Clause decisions has not always run smooth.").

⁷⁸ See *United States v. E.C. Knight Co.*, 156 U.S. 1, 13–14 (1895).

⁷⁹ See *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100, 117 (1941).

⁸⁰ 317 U.S. 111, 127–29 (1942).

⁸¹ *Id.* at 125, 127–29.

⁸² See Boudreaux, *supra* note 76, at 556.

⁸³ See *O'Rourke v. City of Norman*, 875 F.2d 1465, 1469 (10th Cir. 1989) ("[F]or most federal criminal laws in the past century, the jurisdictional basis is the Commerce Clause....").

⁸⁴ See Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 U. KAN. L. REV. 217, 224–25 (1996) ("[T]he Commerce Clause, not the Fourteenth Amendment, was deemed the primary source of constitutional authority supporting the major civil rights statutes of the 1960s.").

⁸⁵ See Blake Hudson, *Reconstituting Land-Use Federalism to Address Transitory and Perpetual Disasters: The Bimodal Federalism Framework*, 2011 B.Y.U. L. REV. 1991, 2044 (2011) ("In the United States, the Commerce Clause is the primary constitutional provision under which most environmental legislation is passed.").

⁸⁶ See, e.g., *NFIB v. Sebelius*, 567 U.S. 519, 558 (2012) (Roberts, C.J.) & *id.* at 649–50 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (collectively concluding that a requirement that an individual purchase health insurance exceeded Congress's authority under the Commerce Clause); *United States v. Morrison*, 529 U.S. 598, 617 (2000) (holding that Congress lacked authority under the Commerce Clause to create a federal civil remedy for the victims of gender-motivated violence); *United States v. Lopez*, 514 U.S. 549, 558 (1995) (invalidating a law prohibiting possessing a gun within 1,000 feet of a school).

⁸⁷ See *Lopez*, 514 U.S. at 558.

⁸⁸ *Id.* at 559.

⁸⁹ *Id.* at 558–59.

Regulating the Channels of Interstate Commerce

Channels of interstate commerce are “the interstate transportation routes through which persons and goods move,”⁹⁰ such as the nation’s highways, railroads, navigable waterways, and airspace.⁹¹ Congress’s authority to regulate the channels of interstate commerce is not confined to activities that have an economic purpose. Instead, Congress has authority “to keep the channels of interstate commerce free from immoral and injurious uses”⁹² and may “exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare.”⁹³ Applying this principle, the Court has upheld Congress’s authority to prohibit the interstate shipment of stolen goods or kidnapped persons;⁹⁴ the interstate shipment of goods produced without minimum-wage and maximum-hour protections;⁹⁵ the interstate transportation of a woman or girl for prostitution;⁹⁶ and the interstate mailing or transportation of lottery tickets.⁹⁷

Regulating the Instrumentalities of Interstate Commerce, or Persons or Things in Interstate Commerce

The *instrumentalities of interstate commerce* refer to the means of interstate commerce, such as an airplane or train, whereas the *persons or things in interstate commerce* refer to the persons or things transported by the instrumentalities among the states.⁹⁸ The Supreme Court has recognized that Congress possesses the authority to address threats to the instrumentalities of commerce or to persons or things in commerce even if those threats “come only from *intrastate* activities.”⁹⁹ The Court has thus upheld federal safety regulations as applied to trains and railcars travelling intrastate on a railroad line because the “absence of appropriate safety appliances” from the intrastate trains and cars was a threat to those moving in interstate commerce.¹⁰⁰ The Court has likewise observed that Congress may validly criminalize the destruction of an aircraft or the theft of interstate shipments.¹⁰¹

Regulating Activities that Substantially Affect Interstate Commerce

Congress possesses the constitutional authority to regulate “activities that substantially affect interstate commerce.”¹⁰² This category, which one court described as the “most unsettled” and

⁹⁰ *Morrison*, 529 U.S. at 613 n.5 (quoting *United States v. Lankford*, 196 F.3d 563, 571–72 (5th Cir.1999)).

⁹¹ *See, e.g.*, *United States v. Ballinger*, 395 F.3d 1218, 1225–26 (11th Cir. 2005).

⁹² *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964).

⁹³ *United States v. Darby*, 312 U.S. 100, 114 (1941).

⁹⁴ *See Perez v. United States*, 402 U.S. 146, 150 (1971).

⁹⁵ *Darby*, 312 U.S. at 112–14.

⁹⁶ *Caminetti v. United States*, 242 U.S. 470, 491–92 (1917).

⁹⁷ *Champion v. Ames (The Lottery Case)*, 188 U.S. 321, 354–55 (1903).

⁹⁸ *See, e.g.*, *United States v. Patton*, 451 F.3d 615, 621–22 (10th Cir. 2006); *United States v. Bishop*, 66 F.3d 569, 588 (3d Cir. 1995), as amended (Sept. 29, 1995).

⁹⁹ *Lopez*, 514 U.S. at 558 (emphasis added).

¹⁰⁰ *S. Ry. Co. v. United States*, 222 U.S. 20, 27 (1911); *see also Hous., E. & W. Tex. Ry. Co. v. United States (The Shreveport Rate Cases)*, 234 U.S. 342, 351–53 (1914) (upholding regulation of intrastate rail rates).

¹⁰¹ *Perez v. United States*, 402 U.S. 146, 150 (1971).

¹⁰² *Lopez*, 514 U.S. at 559.

“most frequently disputed” of the three *Lopez* categories,¹⁰³ authorizes Congress to “regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”¹⁰⁴ In this vein, the Court has stressed that the underlying test for whether Congress has authority to regulate intrastate economic activity is a “modest” one, wherein a “rational basis” needs to exist for Congress’s conclusion that the activities in question, taken in the aggregate, would substantially affect interstate commerce.¹⁰⁵ To determine whether an activity has a “substantial effect” on interstate commerce, courts generally consider four non-dispositive factors:

1. whether the activity itself “has anything to do with commerce or any sort of economic enterprise, however broadly one might define those terms”;
2. “whether the statute in question contains an express jurisdictional element”;
3. “whether there are express congressional findings or legislative history regarding the effects upon interstate commerce of the regulated activity”; and
4. “whether the relationship between the regulated activity and interstate commerce is too attenuated to be regarded as substantial.”¹⁰⁶

The Supreme Court, applying these factors, has ruled that Congress may not invoke the Commerce Clause to regulate certain purely intrastate noneconomic activities. In *United States v. Lopez*, for instance, the Court invalidated a law prohibiting the possession of a gun near a school zone because the law (1) regulated purely noneconomic activity; (2) lacked any jurisdictional element related to interstate commerce; (3) was unsupported by any congressional findings concerning interstate commercial activity; and (4) could only be viewed as regulating activity affecting commerce if the Court were to “pile inference upon inference.”¹⁰⁷ Similarly, in *United States v. Morrison*, the Court struck down legislation creating a federal civil remedy for the victims of gender-motivated violence despite the existence of “numerous” congressional findings concluding that gender-motivated crimes had an effect on interstate commerce.¹⁰⁸ Describing the lack of a jurisdictional element in the law at issue,¹⁰⁹ the Court held in *Morrison* that Congress may not “regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”¹¹⁰

By contrast, the Supreme Court has generally upheld legislation regulating *economic* activity (even if intrastate) that substantially affects interstate commerce.¹¹¹ For instance, in *Lopez* the Court referenced the following examples of economic activities that it had held Congress could regulate based on their substantial effects on interstate commerce: “intrastate coal mining,”¹¹² “intrastate extortionate credit transactions,”¹¹³ “restaurants utilizing substantial interstate

¹⁰³ See *Patton*, 451 F.3d at 622.

¹⁰⁴ *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

¹⁰⁵ See *id.* at 22.

¹⁰⁶ *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068–69 (D.C. Cir. 2003) (internal quotation marks omitted).

¹⁰⁷ See *Lopez*, 514 U.S. at 561–67.

¹⁰⁸ 529 U.S. 598, 614 (2000) (“[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”).

¹⁰⁹ *Id.* at 613.

¹¹⁰ *Id.* at 617.

¹¹¹ See *Lopez*, 514 U.S. at 560.

¹¹² *Id.* at 559 (citing *Hodel v. Va. Surface Min. & Reclamation Ass’n, Inc.*, 452 U.S. 264 (1981)).

¹¹³ *Id.* (citing *Perez v. United States*, 402 U.S. 146 (1971)).

supplies,”¹¹⁴ “inns and hotels catering to interstate guests,”¹¹⁵ and “production and consumption of homegrown wheat.”¹¹⁶ More recently, in *Gonzales v. Raich*, the Court upheld the application of the federal Controlled Substances Act (P.L. 91-513) to the cultivation and possession of marijuana for personal, entirely intrastate medical use, on the grounds that the “failure to regulate that class of activity would undercut the regulation of the interstate market” in marijuana.¹¹⁷

Regulating Inactivity

In *National Federation of Independent Business (NFIB) v. Sebelius*, which concerned the Patient Protection and Affordable Care Act (ACA; P.L. 111-148), a majority of the Court agreed that the Commerce Clause does not authorize Congress to regulate inactivity.¹¹⁸ Among other issues, *NFIB* concerned whether the Commerce Clause authorized Congress to require “most Americans to maintain ‘minimum essential’ health insurance coverage.”¹¹⁹ Writing for himself, Chief Justice Roberts interpreted this “individual mandate” provision of the ACA to require “individuals [who are] not engaged in commerce to purchase an unwanted product.”¹²⁰ Noting that the Court’s Commerce Clause jurisprudence presupposed that the commerce power only reached activity,¹²¹ the Chief Justice concluded that the Commerce Clause did not empower Congress “to regulate individuals precisely because they are doing nothing,” warning that such an interpretation “would open a new and potentially vast domain to congressional authority.”¹²² In so concluding, Chief Justice Roberts rejected the government’s argument that there is “no temporal limitation in the Commerce Clause” and that Congress may therefore regulate individuals who would one day enter the market.¹²³ While the Chief Justice, joined by four other members of the Court, upheld the individual mandate under Congress’s power to “lay and collect taxes,”¹²⁴ the four dissenters in *NFIB* largely echoed Chief Justice Roberts’s view of the Commerce Clause.¹²⁵

¹¹⁴ *Id.* (citing *Katzenbach v. McClung*, 379 U.S. 294 (1964)).

¹¹⁵ *Id.* (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)).

¹¹⁶ *Id.* at 559–60 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)).

¹¹⁷ *Gonzales v. Raich*, 545 U.S. 1, 18 (2005).

¹¹⁸ *See* 567 U.S. 519, 558 (2012) (opinion of Roberts, C.J.) (“The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to ‘regulate Commerce.’”); *see also id.* at 649 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (“[O]ne does not regulate commerce that does not exist by compelling its existence.”).

¹¹⁹ *See id.* at 539 (majority opinion).

¹²⁰ *Id.* at 549 (opinion of Roberts, C.J.). Chief Justice Roberts rejected the argument that there is no distinction between activity and inactivity for purposes of the Commerce Clause, as the commerce power concerns the power to regulate classes of activities, not “classes of *individuals*, apart from any activity in which they are engaged.” *Id.* at 555–56.

¹²¹ *Id.* at 551 (citing *Lopez*, 514 U.S. at 560; *Perez v. United States*, 402 U.S. 146, 154 (1971); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

¹²² *Id.* at 552.

¹²³ *Id.* at 557 (“The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. We have said that Congress can anticipate the *effects* on commerce of an economic activity. But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce.”) (citations omitted).

¹²⁴ *See id.* at 574 (majority opinion) (“The Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”).

¹²⁵ *See id.* at 652–53 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (“If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power....”).

Because no single opinion in *NFIB* enjoyed a majority of five Justices, it is uncertain whether the Chief Justice’s and the dissenters’ conclusions regarding the Commerce Clause constitute binding precedent.¹²⁶ In practice, lower courts following *NFIB* have rarely invalidated Commerce Clause legislation on “inactivity” grounds because much of what Congress regulates can be described as a form of “activity.”¹²⁷ For instance, in rejecting a challenge to another provision of the ACA—namely, the “employer mandate,” which requires certain employers to offer a minimum level of health insurance coverage to their employees and the employees’ dependents—the Fourth Circuit distinguished the employer mandate from the individual mandate.¹²⁸ Specifically, the appellate court concluded that, unlike the individual mandate, the employer mandate does not “create commerce in order to regulate it” because employers, “by their very nature,” are already “engaged in economic activity.”¹²⁹ The Fourth Circuit thus held that the employer mandate does not compel employers to “become active in commerce,” but rather “merely regulate[s] existing commercial activity.”¹³⁰

Outside the context of the ACA, Commerce Clause challenges predicated on *NFIB*’s inactivity principle have likewise been largely unsuccessful. For instance, in *United States v. Roszkowski*, the First Circuit rejected the argument that 18 U.S.C. § 922(g), a law that forbids convicted felons from possessing a firearm “in or affecting commerce,” exceeded Congress’s commerce powers under the inactivity rationale discussed in *NFIB*.¹³¹ Specifically, the First Circuit concluded that Section 922(g) was in “stark contrast to the individual mandate” at issue in *NFIB*, in that the former statute did not compel individuals to become active in commerce, but instead *prohibited* “affirmative conduct that has an undeniable connection to interstate commerce.”¹³² In another context, the Second Circuit, in *United States v. Robbins*, held that the Sex Offender Registration and Notification Act (SORNA; P.L. 109-248, tit. I) did not impermissibly regulate noneconomic inactivity by making it a crime for a sex offender to travel in interstate commerce and knowingly fail to update his offender registration.¹³³ The *Robbins* court reasoned that, unlike those subject to the individual mandate under the ACA, “sex offenders who are subjected to SORNA’s requirements have all, in a sense, ‘opted in’ to the regulated group through their prior criminal activity.”¹³⁴

¹²⁶ See, e.g., *United States v. Robbins*, 729 F.3d 131, 135 (2d Cir. 2013) (“It is not clear whether anything said about the Commerce Clause in *NFIB*’s primary opinion—that of Chief Justice Roberts—is more than dicta, since Part III-A of the Chief Justice’s opinion was not joined by any other Justice and, at least arguably, discussed a bypassed alternative, rather than a necessary step, in the Court’s decision to uphold the Act.”); *United States v. Henry*, 688 F.3d 637, 641 n.5 (9th Cir. 2012) (“There has been considerable debate about whether the statements about the Commerce Clause [in *NFIB*] are dicta or binding precedent.”).

¹²⁷ See, e.g., *United States v. McLean*, 702 F. App’x 81, 87–88 (3d Cir. 2017) (“*NFIB* concerned Congress’ authority to compel commercial activity, not its ability to proscribe attempted or planned criminal activity.”); *Mason v. Warden, Fort Dix FCI*, 611 F. App’x 50, 53 (3d Cir. 2015) (“Contrary to Mason’s contention, that Commerce Clause ruling does not undermine his Hobbs Act convictions, for neither the Hobbs Act itself, nor the facts of his case, involve *compelling* commerce.”).

¹²⁸ *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 93 (4th Cir. 2013).

¹²⁹ *Id.*

¹³⁰ *Id.* (quoting *NFIB v. Sebelius*, 567 U.S. 519, 552 (2012) (opinion of Roberts, C.J.)).

¹³¹ 700 F.3d 50, 58 (1st Cir. 2012).

¹³² *Id.* For other unsuccessful challenges to 18 U.S.C. § 922(g) based on *NFIB*, see *United States v. Bron*, 709 F. App’x 551, 554 (11th Cir. 2017); *United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013).

¹³³ See 729 F.3d 131, 135–36 (2d Cir. 2013).

¹³⁴ *Id.* at 136. In addition, the Second Circuit noted that “the registration requirement that Robbins himself failed to meet was triggered by activity: his change of residence and travel across state lines.” *Id.* For other unsuccessful challenges to SORNA based on *NFIB*, see, e.g., *United States v. White*, 782 F.3d 1118, 1125 (10th Cir. 2015); *United*

Although lower courts generally have not relied on *NFIB* to invalidate federal actions as outside the Commerce Clause, the Fifth Circuit’s ruling in *BST Holdings, LLC v. Occupational Safety & Health Administration* is an exception.¹³⁵ In *BST*, the court stayed enforcement of an Occupational Safety and Health Administration (OSHA) mandate that had required employees of covered employers to undergo COVID-19 vaccination or else take weekly COVID tests and wear masks.¹³⁶ Among other reasons for staying the mandate, the court determined that it “likely exceed[ed] the federal government’s authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States’ police power.”¹³⁷ Citing *NFIB*, the Fifth Circuit stated that “[a] person’s choice to remain unvaccinated and forgo regular testing is noneconomic inactivity.”¹³⁸ Following the Fifth Circuit’s ruling, however, legal challenges to the OSHA mandate were consolidated in the Sixth Circuit, which disagreed with the Fifth Circuit’s reasoning and dissolved the stay.¹³⁹ Rejecting the Fifth Circuit’s Commerce Clause analysis, the Sixth Circuit concluded that OSHA’s vaccination mandate “regulates economic activity by regulating employers.”¹⁴⁰ The Supreme Court eventually reinstated the stay on the basis that Congress had not statutorily authorized OSHA to impose the mandate.¹⁴¹ The Court’s opinion did not address the mandate’s validity under the Commerce Clause.

Treaty Power

At least since the Supreme Court’s 1920 ruling in *Missouri v. Holland*,¹⁴² courts have recognized that Congress has considerable power, even beyond the scope of its Article I enumerated powers, when legislating to implement a treaty ratified pursuant to Article II, Section 2 of the Constitution. In *Holland*, the Supreme Court upheld a federal law regulating the killing of migratory birds that had been adopted pursuant to a treaty between the United States and Great Britain, even though a lower court had concluded that a similar statute enacted in the absence of a treaty was beyond the scope of Congress’s enumerated powers and therefore unconstitutional on Tenth Amendment grounds.¹⁴³ The Court explained in *Holland* that, to evaluate the statute’s constitutionality, it was

States v. Howell, 557 F. App’x 579, 580 (7th Cir. 2014); United States v. Anderson, 771 F.3d 1064, 1070 (8th Cir. 2014).

Another federal statute that has been the subject of several unsuccessful Commerce Clause challenges based on *NFIB*’s inactivity principle is 18 U.S.C. § 2251, which, among other things, prohibits the production of child pornography. *See, e.g.,* United States v. Humphrey, 845 F.3d 1320, 1323 (10th Cir. 2017) (upholding a federal law prohibiting the production of child pornography because producing pornography made the defendant “akin to the farmer in *Wickard*, not the uninsured individuals in *NFIB*”); United States v. Sullivan, 797 F.3d 623, 632 (similar); United States v. Parton, 749 F.3d 1329, 1331 (11th Cir. 2014) (similar).

¹³⁵ 17 F.4th 604 (5th Cir. 2021).

¹³⁶ *Id.* at 609.

¹³⁷ *Id.* at 617.

¹³⁸ *Id.*

¹³⁹ *See In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021).

¹⁴⁰ *Id.* at 384.

¹⁴¹ *See NFIB v. Dep’t of Lab.*, 142 S. Ct. 661, 665 (2022) (“Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA’s regulatory authority without clear congressional authorization.”). Following the Supreme Court’s ruling, OSHA withdrew the mandate and the Sixth Circuit dismissed as moot the petitions challenging it.

¹⁴² 252 U.S. 416 (1920).

¹⁴³ *See id.* at 432.

not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land.¹⁴⁴

The *Holland* Court thus concluded that, as long as the treaty was valid, there could “be no dispute about the validity of the statute ... as a necessary and proper means to execute the powers of Government.”¹⁴⁵ *Holland* therefore stands for the proposition that Congress generally has the power to enact legislation to implement a treaty even where it would lack the power to act on the same subject matter in the treaty’s absence.¹⁴⁶ However, the complete extent to which Congress may intrude upon traditional state authority through treaty-implementing legislation remains unclear. Some scholars have suggested, for example, that there is reason to believe that Congress could not enact legislation that infringes upon the essential character of the states, such as legislation that commandeers state executive and legislative authorities.¹⁴⁷

In *Bond v. United States*, the petitioner asked the Court to reconsider the extent to which the Tenth Amendment constrains Congress’s ability to enact treaty-implementing legislation.¹⁴⁸ The petitioner in *Bond* had been convicted under the Chemical Weapons Convention Implementation Act of 1998 (CWCIA; P.L. 105-277)¹⁴⁹ for attempting to poison her husband’s paramour with toxic chemicals.¹⁵⁰ She argued that the act, as applied to her, impermissibly intruded upon matters falling under traditional state authority,¹⁵¹ and that Congress may not act beyond the scope of its enumerated powers to implement a treaty.¹⁵² However, the Court ultimately opted not to revisit its earlier statement in *Missouri v. Holland* regarding the scope of the Treaty Power or provide any clear signal as to whether it agreed with the earlier Court’s characterization.¹⁵³ Although three concurring Justices argued that the scope of Congress’s power to implement a treaty does not extend beyond its enumerated authority,¹⁵⁴ the majority opinion of the Court declined to reach the

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Since *Holland*, reviewing courts have deemed a number of federal statutes implementing treaty requirements constitutionally permissible under the Necessary and Proper Clause. See, e.g., *United States v. Rife*, 33 F.4th 838, 841 (6th Cir. 2022) (upholding statute that prohibits engaging in “illicit sexual conduct” in foreign places, 18 U.S.C. § 2423(c), as necessary and proper to implement the Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography), *cert. denied*, No. 22-5306, 2022 WL 9551050 (U.S. Oct. 17, 2022); *United States v. Ferreira*, 275 F.3d 1020, 1027–28 (11th Cir. 2001) (upholding Hostage Taking Act, 18 U.S.C. § 1203, as necessary and proper to implement the International Convention Against the Taking of Hostages); *United States v. Wang Kun Lue*, 134 F.3d 79, 84 (2d Cir. 1997) (same). See also *United States v. Lara*, 541 U.S. 193, 201 (2004) (citing to the Indian Commerce Clause and Treaty Clause as providing Congress with power to legislate on Indian tribe issues, and stating that “treaties ... can authorize Congress to deal with matters with which otherwise Congress could not deal”) (internal quotations omitted).

¹⁴⁷ See generally Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003). For criticism of the Supreme Court’s decision in *Missouri v. Holland*, and arguments that the Treaty Power may not expand Congress’s legislative power, see Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1868 (2005).

¹⁴⁸ 572 U.S. 844, 853 (2014).

¹⁴⁹ 18 U.S.C. § 229.

¹⁵⁰ 572 U.S. at 848.

¹⁵¹ *Id.* at 855.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See *id.* at 867–82 (Scalia, J., concurring in the judgment).

constitutional issue.¹⁵⁵ The Court instead determined that the criminal provisions of the CWCIA should “be read consistent with principles of federalism inherent in our constitutional structure,” and therefore should not be interpreted to cover the petitioner’s conduct.¹⁵⁶ *Holland* therefore remains good law.¹⁵⁷ However, *Bond* makes clear that, irrespective of related treaties, statutes must be interpreted consistent with the background assumption that “Congress normally preserves the constitutional balance between the National Government and the States.”¹⁵⁸

Congress’s Powers Under the Civil War Amendments

The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution—referred to collectively as the “Civil War Amendments” or “Reconstruction Amendments”¹⁵⁹—grant Congress additional powers beyond those set forth in the original Constitution. The United States ratified each of these amendments after the Civil War to end slavery and secure equal rights for formerly enslaved persons.¹⁶⁰ The Thirteenth Amendment prohibits slavery and involuntary servitude within the United States.¹⁶¹ The Fourteenth Amendment, among other things, provides that no state shall “deprive any person of life, liberty, or property, without due process of law” or “deny to any person within its jurisdiction the equal protection of the laws.”¹⁶² The Fifteenth Amendment guarantees that the right to vote “shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”¹⁶³ The Civil War Amendments significantly altered the balance of power between the states and the federal government¹⁶⁴ by limiting state authority and granting Congress new powers to “secure to all

¹⁵⁵ *Id.* at 855 (majority opinion).

¹⁵⁶ *Id.* at 856. For further discussion of the *Bond* ruling, see CRS Report R42968, *Bond v. United States: Validity and Construction of the Federal Chemical Weapons Statute*, by Charles Doyle.

¹⁵⁷ In the aftermath of *Bond*, the Ninth Circuit rejected a constitutional challenge to the CWCIA, finding that the statute, when applied to a crime that was not “purely local” in nature, was “within the constitutional powers of the federal government under the Necessary and Proper Clause and the Treaty Power.” *United States v. Fries*, 781 F.3d 1137, 1148 (9th Cir. 2015) (quoting *United States v. Bond*, 681 F.3d 149, 165 (3d Cir. 2012), *rev’d*, 572 U.S. 844 (2014)). See also *United States v. Mikhel*, 889 F.3d 1003, 1023–24 (9th Cir. 2018) (upholding Hostage Taking Act under the Treaty Power and noting that, “[a]lthough this broad reading of the Necessary and Proper Clause has been criticized and debated ... the Supreme Court has never undertaken to clarify or correct our understanding. We are thus bound by our prior cases.” (citation omitted)).

¹⁵⁸ *Bond*, 572 U.S. at 862 (internal quotations omitted) (quoting *Bond I*, 564 U.S., 211, 222 (2011)).

¹⁵⁹ This shorthand reflects the fact that the three amendments were ratified between 1865 and 1870 in the wake of the Union’s victory in the American Civil War. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) (using the term “Civil War Amendments”); *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970) (same); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 223 (2009) (Thomas, J., concurring in part and dissenting in part) (using the term “Reconstruction Amendments”). It should be noted, however, that these three amendments were neither drafted nor enacted as a package. See generally John E. Nowak, *Federalism and the Civil War Amendments*, 23 OHIO N.U. L. REV. 1209, 1211–15 (1997) (overviewing history of the passage and ratification of the Civil War Amendments).

¹⁶⁰ See *Ex parte Virginia*, 100 U.S. 339, 344–45 (1879) (“One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States.”).

¹⁶¹ U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

¹⁶² *Id.* amend. XIV, § 1.

¹⁶³ *Id.* amend. XV, § 1.

¹⁶⁴ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996) (“[T]he Fourteenth Amendment, by expanding federal power at the expense of state autonomy ... fundamentally altered the balance of state and federal power struck by the Constitution.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (“The Civil War Amendments

persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion.”¹⁶⁵

Each of the Civil War Amendments gives Congress the “power to enforce” its provisions “by appropriate legislation.”¹⁶⁶ Congress’s power to enforce the Civil War Amendments goes beyond legislation that simply prohibits unconstitutional conduct. Rather, Congress may legislate prophylactically to deter or remedy constitutional violations “even if in the process it prohibits conduct which is not itself unconstitutional.”¹⁶⁷ For example, to enforce the Thirteenth Amendment’s prohibition on slavery, Congress possesses constitutional authority to eliminate the “badges and the incidents of slavery,” such as by banning racial discrimination in the sale of real property.¹⁶⁸ Similarly, to enforce the Fifteenth Amendment’s prohibition on racially discriminatory voting restrictions, Congress may ban the use of literacy tests in state and national elections,¹⁶⁹ even though literacy tests are not themselves always unconstitutional.¹⁷⁰

Likely because of its broad, general guarantees of “due process” and “equal protection of the laws,”¹⁷¹ issues concerning Congress’s power under the Fourteenth Amendment arise more often than the other two Civil War Amendments. The remainder of this section thus focuses on Congress’s enforcement power under Section 5 of the Fourteenth Amendment.¹⁷²

themselves worked a dramatic change in the balance between congressional and state power over matters of race.”); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1195 (1991) (“[The Civil War Amendments] radically transform[ed] the nature of American federalism.”). One such fundamental change is that, prior to the Civil War Amendments, the Supreme Court had held that the protections in the Bill of Rights did not apply to the actions of the states. *See, e.g., Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. 243, 247 (1833) (holding that the Fifth Amendment does not apply to the states). Following the enactment of the Fourteenth Amendment, however, the Court has held that many of the protections of the Bill of Rights are applicable to the states. *See McDonald v. City of Chicago*, 561 U.S. 742, 765 n.13, (2010) (noting the few provisions of the Bill of Rights that the Court has not held to be incorporated against the states).

¹⁶⁵ *Ex parte Virginia*, 100 U.S. 339, 346 (1879). *See also id.* at 345 (“[The Civil War Amendments] were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress.”).

¹⁶⁶ U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

¹⁶⁷ *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997), *superseded by statute in part*, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), P.L. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc).

¹⁶⁸ *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413, 440–43 (1968) (holding that statute banning “racial discrimination, private as well as public, in the sale or rental of property” was “a valid exercise of the power of Congress to enforce the Thirteenth Amendment”); *The Civil Rights Cases*, 109 U.S. 3, 21 (1883) (“[Under the Thirteenth Amendment,] Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents....”).

¹⁶⁹ *See Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (opinion of Black, J.) (“Congress, in the exercise of its power to enforce the Fourteenth and Fifteenth Amendments, can prohibit the use of literacy tests or other devices used to discriminate against voters on account of their race in both state and federal elections.”); *accord Katzenbach v. Morgan*, 384 U.S. 641, 649 (1966).

¹⁷⁰ *See Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 50–53 (1959) (holding that use of literacy test for voters, if “fair on its face” and “neutral[ly]” applied, is constitutional).

¹⁷¹ U.S. CONST. amend. XIV, § 1.

¹⁷² Congress’s independent powers to enforce the other two Civil War Amendments are substantial, however. For example, the Thirteenth Amendment has been relied on to uphold federal hate crimes legislation, *see, e.g., United States v. Diggins*, 36 F.4th 302, 309 (1st Cir. 2022) (collecting federal cases upholding the Shepard-Byrd Hate Crimes Prevention Act under Section 2 of the Thirteenth Amendment), while the Fifteenth Amendment has been relied on to support voting rights legislation, *see, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) (upholding the Voting Rights Act of 1965 under Section 2 of the Fifteenth Amendment).

Although Congress’s power to enforce the Fourteenth Amendment is broad, “it is not unlimited.”¹⁷³ In particular, the Supreme Court has recognized two major limitations to Congress’s power under Section 5 of the Fourteenth Amendment. First, Congress may legislate only against “state action”: it may not rely on the Fourteenth Amendment to regulate the conduct of private (i.e., non-state) actors.¹⁷⁴ Second, Congress may legislate only *remedially* under the Fourteenth Amendment; it may not change the substantive scope of the rights guaranteed.¹⁷⁵ In other words, enforcement legislation must be “targeted at ‘conduct transgressing the Fourteenth Amendment’s substantive provisions,’”¹⁷⁶ such that there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹⁷⁷

The State Action Requirement

The first limitation—the “state action requirement”—derives from the text of Section 1 of the Fourteenth Amendment, which explicitly proscribes only certain actions undertaken by “State[s].”¹⁷⁸ The Supreme Court has interpreted this language to mean that Congress may legislate only to combat discrimination by or through state governments; it may not rely on the Fourteenth Amendment to regulate “merely private conduct, however discriminatory or wrongful.”¹⁷⁹ The state action requirement thus “preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.”¹⁸⁰ It also avoids imposing liability on state agencies and officials “for conduct for which they cannot fairly be blamed.”¹⁸¹

For example, in the 1883 *Civil Rights Cases*, the Supreme Court held that Congress had no authority under the Fourteenth Amendment to prohibit racial discrimination in places of public accommodation (such as inns, theaters, and railroads) because such laws targeted discrimination

¹⁷³ *City of Boerne v. Flores*, 521 U.S. 507, 518, *superseded by statute in part*, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), P.L. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc) (quoting *Mitchell*, 400 U.S. at 128 (opinion of Black, J.)).

¹⁷⁴ See *United States v. Morrison*, 529 U.S. 598, 620–21 (2000) (“The language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct.... Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action.”). The Fifteenth Amendment, too, is generally understood to require state action. See, e.g., *Smith v. Allwright*, 321 U.S. 649, 664 (1944) (holding that racial discrimination by political party in primary elections constitutes “state action within the meaning of the Fifteenth Amendment”). *But see* Note, *The Strange Career of ‘State Action’ Under the Fifteenth Amendment*, 74 *YALE L.J.* 1448, 1449 (1965) (noting that early Supreme Court cases “construe[d] congressional enforcement power under the fifteenth amendment to reach private individuals”). Notably, the Thirteenth Amendment lacks any state action requirement. See *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) (upholding, under the Thirteenth Amendment, a federal cause of action for victims of racially discriminatory conspiracies committed by private citizens).

¹⁷⁵ See *City of Boerne*, 521 U.S. at 519 (“The design of the [Fourteenth] Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States.”). In addition, when legislating under the Fourteenth and Fifteenth Amendments, Congress may not violate “the fundamental principle of equal sovereignty” by treating states unequally without sufficient reason. See *Shelby Cnty. v. Holder*, 570 U.S. 529, 542 (2013). This equal sovereignty limit is explained in more detail in a separate section of this report. See *infra* “Equal Sovereignty Doctrine.”

¹⁷⁶ *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 36 (2012) (plurality opinion) (quoting *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999)).

¹⁷⁷ *City of Boerne*, 521 U.S. at 520.

¹⁷⁸ See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge....”) (emphasis added).

¹⁷⁹ *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

¹⁸⁰ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

¹⁸¹ *Id.*

by private citizens.¹⁸² Much more recently, the Supreme Court reaffirmed the state action requirement in *United States v. Morrison*, holding that Congress could not create a federal remedy for victims of gender-motivated violence under Section 5 because the law “is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.”¹⁸³

Conduct by ostensibly private actors will be treated as a state action only if “there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”¹⁸⁴ Such a close nexus requires that (1) “the claimed constitutional deprivation ... resulted from the exercise of a right or privilege having its source in state authority”¹⁸⁵ and (2) “the party charged with the deprivation must be a person who may fairly be said to be a state actor.”¹⁸⁶ For example, if a private citizen is a “willful participant in joint activity with the State or its agents” he or she may be held to account under the Fourteenth Amendment as if he or she were a state official.¹⁸⁷ Whether an individual may fairly be said to be a state actor is a “necessarily fact-bound inquiry.”¹⁸⁸ Even so, discriminatory state legislation or conduct by individual state officials acting in their official capacity will satisfy the state action requirement.¹⁸⁹

“Congruence and Proportionality” for Remedial Legislation

The second major limitation on Congress’s Fourteenth Amendment power is that enforcement legislation must be “remedial” in nature.¹⁹⁰ Congress is not limited to legislating against actual constitutional violations; it may go further “to remedy and to deter violation of [constitutional rights] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden” by the Fourteenth Amendment.¹⁹¹ Nonetheless, Congress can only *enforce* the rights guaranteed by the Amendment; it may not alter the substantive scope of the rights themselves.¹⁹²

¹⁸² See 109 U.S. 3, 11 (“Individual invasion of individual rights is not the subject-matter of the amendment.”); *id.* at 13 (“[U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity....”). As a result of the state action limit on its Fourteenth Amendment powers, Congress has instead relied on its Commerce Clause powers to prohibit discrimination in public accommodations. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (holding that Congress has authority to prohibit racial discrimination in hotels under the Commerce Clause); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (holding that Congress has power to prohibit racial discrimination in restaurants under the Commerce Clause). See generally *supra* “Commerce Clause.”

¹⁸³ 529 U.S. 598, 626 (2000).

¹⁸⁴ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

¹⁸⁵ *Lugar*, 457 U.S. at 938–89.

¹⁸⁶ *Id.* at 937.

¹⁸⁷ *United States v. Price*, 383 U.S. 787, 794 (1966).

¹⁸⁸ *Lugar*, 457 U.S. at 939.

¹⁸⁹ See, e.g., *Ex parte Virginia*, 100 U.S. 339, 346 (1879) (“Congress is empowered to enforce [the Fourteenth Amendment], and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial.”); *United States v. Raines*, 362 U.S. 17, 25 (1960) (“[D]iscrimination by state officials, within the course of their official duties ... is certainly, a[] ‘state action’ and the clearest form of it . . .”).

¹⁹⁰ See *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (distinguishing between “appropriate remedial” legislation enforcing the Fourteenth Amendment and unconstitutional “substantive redefinition” of the Amendment).

¹⁹¹ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).

¹⁹² *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997), *superseded by statute in part*, Religious Land Use and

In the landmark case *City of Boerne v. Flores*, the Supreme Court crafted a test to determine when legislation to enforce the Fourteenth Amendment sweeps so broadly as to be unconstitutional. *Boerne* addressed the constitutionality of the Religious Freedom Restoration Act (RFRA; P.L. 103-141) as it applied to the states.¹⁹³ RFRA prohibited governments from substantially burdening any person’s exercise of religion unless it was “in furtherance of a compelling governmental interest” and used “the least restrictive means” of furthering that interest.¹⁹⁴ Congress enacted RFRA in response to an earlier Supreme Court decision, *Employment Division v. Smith*, which held that neutral, generally applicable state laws were not subject to heightened scrutiny under the First Amendment, even when such laws were applied to religiously motivated practices.¹⁹⁵ Thus, in *Smith*, Oregon could enforce its general criminal prohibition on peyote use against the sacramental use of that drug in Native American churches without violating the First Amendment.¹⁹⁶ Through RFRA, Congress sought to invoke its Fourteenth Amendment powers to establish a stricter test for religious liberty claims than the *Smith* standard. *Boerne* held, however, that RFRA exceeded Congress’s power because Congress could not “decree the substance of the Fourteenth Amendment’s restrictions on the States.”¹⁹⁷ Although Congress can act to “remedy or prevent unconstitutional actions,” the Supreme Court explained that “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end” must exist.¹⁹⁸ The Court found that RFRA failed the proportionality requirement because the legislative record lacked “examples of modern instances of generally applicable laws passed because of religious bigotry,” and the statute’s sweeping coverage threatened general state laws “of almost every description and regardless of subject matter.”¹⁹⁹

Courts applying *Boerne*’s “congruence and proportionality” test typically use a three-step approach. First, the court “identif[ies] with some precision the scope of the constitutional right” that the legislation is intended to remedy.²⁰⁰ Second, the court examines “whether Congress identified a history and pattern of unconstitutional [violations] by the States” as to the constitutional right at issue.²⁰¹ Finally, the court compares the scope of the law to the history of violations to determine whether the legislation is “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”²⁰²

Nearly all of the Supreme Court decisions applying *Boerne* arise in the context of congressional attempts to abrogate state immunity to suit under the Eleventh Amendment. As explained in detail below,²⁰³ states generally cannot be sued unless Congress validly revokes their Eleventh

Institutionalized Persons Act of 2000 (RLUIPA), P.L. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc) (“[Congress] has been given the power “to enforce” [the Fourteenth Amendment,] not the power to determine what constitutes a constitutional violation.”).

¹⁹³ *Id.* at 511.

¹⁹⁴ *Id.* at 515–16 (quoting 42 U.S.C. § 2000bb-1).

¹⁹⁵ 494 U.S. 872, 880–85 (1990).

¹⁹⁶ *Id.* at 874, 890.

¹⁹⁷ *City of Boerne*, 521 U.S. at 519.

¹⁹⁸ *Id.* at 519–20.

¹⁹⁹ *Id.* at 530–34.

²⁰⁰ *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001).

²⁰¹ *Id.* at 368. *See also* *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 37 (2012) (plurality opinion) (holding that remedial legislation requires “evidence of a pattern of state constitutional violations”).

²⁰² *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000) (quoting *City of Boerne*, 521 U.S. at 532).

²⁰³ *See* “The Eleventh Amendment and State Sovereign Immunity.”



The House of Representatives and Senate Explained

Congressional Procedure

**A Practical Guide to the Legislative
Process in the U.S. Congress**

Richard A. Arenberg

Foreword by Alan S. Frumin

 **TheCapitolNet**

Amendment immunity.²⁰⁴ Congress also cannot generally use its Article I powers, such as its Commerce Clause power, to abrogate the states' Eleventh Amendment immunity,²⁰⁵ save in narrow situations in which states implicitly consented to suit as part of the “plan of the [Constitutional] convention”²⁰⁶ or when the congressional power at issue is “complete in itself.”²⁰⁷ As a result, Congress must often rely on its enforcement power under the Fourteenth Amendment if it seeks to pass legislation that subjects states to suit in federal court.²⁰⁸

The decisions applying *Boerne* to purported abrogations of Eleventh Amendment immunity have sharply divided the Supreme Court.²⁰⁹ As a result, it can be difficult to predict how the Court will rule in any particular case,²¹⁰ and the decisions can be highly fact-bound. For example, in the context of the Americans with Disabilities Act of 1990 (ADA; P.L. 101-336), the Court has held that Congress cannot abrogate state immunity with respect to Title I of the ADA (which prohibits disability discrimination in employment),²¹¹ but that it *can* abrogate state immunity with respect to some applications of Title II of the ADA (which prohibits disability discrimination in the provision of public services).²¹² In the context of the Family Medical Leave Act (FMLA; P.L. 103-3), the Court has held that Congress may validly abrogate state immunity with respect to FMLA's guarantee of leave for an employee to take care of ill family members (the “family-care” provisions),²¹³ but not with respect to FMLA's guarantee of leave when the employee is sick (the “self-care” provisions).²¹⁴

Generally speaking, these cases often turn on whether the legislative record establishes a history or pattern of state violations of the constitutional right at issue.²¹⁵ For example, in *Tennessee v. Lane*, the Supreme Court found that the legislative record showed a pattern of “unconstitutional discrimination against persons with disabilities in the provision of public services” that justified congressional abrogation of state immunity with respect to Title II of the ADA.²¹⁶ In contrast, in

²⁰⁴ See *infra* “The Eleventh Amendment and State Sovereign Immunity” (explaining constitutional basis and scope of state sovereign immunity).

²⁰⁵ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996); *Allen v. Cooper*, 140 S. Ct. 994, 1002 (2020).

²⁰⁶ *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 377 (2006).

²⁰⁷ *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2463 (2022) (quoting *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2263 (2021)).

²⁰⁸ See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (permitting congressional abrogation of state sovereign immunity pursuant to Section 5 of the Fourteenth Amendment). See also *infra* “The Eleventh Amendment and State Sovereign Immunity.”

²⁰⁹ See, e.g., *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30 (2012) (holding abrogation of immunity invalid by a 5-4 decision with two separate concurrences); *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding abrogation of immunity valid by a 5-4 decision with two separate concurring opinions and three separate dissenting opinions); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding attempted abrogation of immunity invalid by a 5-4 decision).

²¹⁰ See *Coleman*, 566 U.S. at 44 (Scalia, J., concurring) (“[T]he varying outcomes we have arrived at under the ‘congruence and proportionality’ test make no sense.”).

²¹¹ *Garrett*, 531 U.S. at 360–61.

²¹² *Lane*, 541 U.S. at 533–34.

²¹³ *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 725 (2003).

²¹⁴ *Coleman*, 566 U.S. at 33–34.

²¹⁵ Compare *Garrett*, 531 U.S. at 370 (finding that “Congress assembled only ... minimal evidence of unconstitutional state discrimination in employment against the disabled”) with *id.* at 377–79 (Breyer, J., dissenting) (finding that “Congress compiled a vast legislative record documenting ‘massive, society-wide discrimination’ against persons with disabilities” including “roughly 300 examples of discrimination by state governments themselves” (quoting S. REP. NO. 101-116, at 8–9 (1989))).

²¹⁶ See *Lane*, 541 U.S. at 525–28.

Board of Trustees of the University of Alabama v. Garrett, the Court struck down legislation that applied the ADA to state government employment decisions based (in part) on its finding that there was no “history and pattern of unconstitutional employment discrimination by the States against the disabled.”²¹⁷

Another important consideration for Congress’s power under the Fourteenth Amendment is the particular constitutional right at issue. Courts have tended to be more deferential to uses of Congress’s Fourteenth Amendment power when the violations involve a suspect classification (such as race or sex) or a fundamental right. For example, one reason that the Supreme Court found a valid abrogation with respect to FMLA’s family-care leave provisions was that the legislation sought to combat sex discrimination in the workplace, and courts typically subject distinctions based on sex to heightened scrutiny.²¹⁸ In contrast, the Court found a purported abrogation invalid with respect to the ADA’s employment disability discrimination provisions in part because disability classifications are subject only to rational-basis review.²¹⁹ The Court later limited that holding as to Title II of the ADA, however, largely because the particular variety of disability discrimination at issue—denial of courthouse access—involved not just discrimination but also the fundamental right of due process of law.²²⁰

Courts applying the *Boerne* test also evaluate the breadth of the congressional remedy in relation to the severity of the constitutional violation that Congress seeks to prevent.²²¹ Thus, in *Tennessee v. Lane*, the Court held that there was a valid abrogation of immunity in part because Congress chose a “limited” remedy of affording reasonable accommodations to the disabled.²²² In contrast, *Boerne* itself found that RFRA lacked congruence and proportionality because the act would subject states to “the most demanding test known to constitutional law” even when the conduct at issue did not violate the Constitution.²²³

A court need only assess whether a challenged statute satisfies the congruence and proportionality test if the legislation is “prophylactic”; that is, if it purports to regulate conduct beyond actual violations of the Fourteenth Amendment.²²⁴ When Congress merely creates a cause of action for activity that “actually violates the Fourteenth Amendment,” Congress may abrogate state sovereign immunity without a showing of congruence and proportionality.²²⁵

As a practical matter, there are two main steps that legislators may consider to decrease the likelihood that a court will conclude that a given law exceeds Congress’s Fourteenth Amendment enforcement powers. First, Congress may develop a substantial legislative record that

²¹⁷ *Garrett*, 531 U.S. at 368.

²¹⁸ *Hibbs*, 538 U.S. at 728.

²¹⁹ See *Garrett*, 531 U.S. at 366–67.

²²⁰ See *Lane*, 541 U.S. at 522–23.

²²¹ See *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997), *superseded by statute in part*, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), P.L. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc). (“Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.”).

²²² *Lane*, 541 U.S. at 531–34.

²²³ *City of Boerne*, 521 U.S. at 534–35; see also *id.* at 532 (“Sweeping coverage ensures [RFRA’s] intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.”).

²²⁴ *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (defining “prophylactic legislation” as a law that “proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct”).

²²⁵ See *United States v. Georgia*, 546 U.S. 151, 159 (2006) (concluding that Congress may validly abrogate state sovereign immunity to the extent a law merely “creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment”).

demonstrates a “history and pattern” of constitutional violations justifying the remedial legislation.²²⁶ Congress will have more leeway to craft a legislative remedy when the history of constitutional violations is severe,²²⁷ implicates a fundamental right,²²⁸ or involves a suspect classification.²²⁹ Second, Congress may craft its remedy “in narrow terms to address or prevent” those constitutional violations.²³⁰ Although Congress has power to regulate conduct that does not itself violate the Fourteenth Amendment, under *Boerne* it may wish to avoid sweeping too broadly in creating a remedy.²³¹

Necessary and Proper Clause

Supplementing Congress’s enumerated powers is the Necessary and Proper Clause, which grants Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution” the powers enumerated in Article I of the Constitution, as well as “all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.”²³² The Necessary and Proper Clause is typically understood not as an independent grant of congressional power,²³³ but as an extension of all the other powers vested in the federal government, including Congress’s enumerated Article I powers.²³⁴ Thus, explicitly or

²²⁶ See, e.g., *Lane*, 541 U.S. at 530 (finding Title II of the ADA an “appropriate response” to a “history and pattern of unequal treatment” of persons with disabilities).

²²⁷ See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (approving “stringent new remedies” to “banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century”), *abrogated in part by* *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (opinion of Black, J.) (relying on the “long history of the discriminatory use of literacy tests to disfranchise voters on account of their race” to uphold congressional ban on literacy tests for voting).

²²⁸ See, e.g., *Lane*, 541 U.S. at 522–23 (observing that Title II of the ADA targets both “irrational disability discrimination” and rights, like access to the courts under the Due Process Clause, that are “subject to more searching judicial review”).

²²⁹ Compare *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) (holding that Congress’s purported abrogation under the Age Discrimination in Employment Act was invalid in part because “[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest”), with *Hibbs*, 538 U.S. at 728 (holding that Congress validly abrogated state sovereign immunity pursuant to FMLA family-care leave provisions in part because “statutory classifications that distinguish between males and females are subject to heightened scrutiny”).

²³⁰ *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 37 (2012). For example, the Court in *Allen v. Cooper* found the Copyright Remedy Clarification Act did not validly abrogate state sovereign immunity to copyright infringement suits in part because the remedy Congress provided was “out of proportion” because it was not tailored to actual constitutional violations. *Allen v. Cooper*, 140 S. Ct. 994, 1005–07 (2020); see also CRS Legal Sidebar LSB10356, *Piracy, Old and New: Copyright, State Sovereignty, and the Queen Anne’s Revenge*, by Kevin J. Hickey.

²³¹ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997), *superseded by statute in part*, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), P.L. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc). (“[RFRA] is broader than is appropriate if the goal is to prevent and remedy constitutional violations.”).

²³² U.S. CONST. art. I, § 8, cl. 18; see generally Cong. Rsch. Serv., *Overview of Necessary and Proper Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C18-1/ALDE_00001242/ (last visited Dec. 13, 2022).

²³³ Although “Necessary and Proper Clause” is the modern term for this constitutional provision, historically it was often called the “Sweeping Clause.” See, e.g., THE FEDERALIST No. 33 (Alexander Hamilton); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1059 & n. 47 (2014) (“[The Framers] referred to the last clause of Article I, Section 8 as the ‘Sweeping Clause.’”).

²³⁴ See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960) (“The [Necessary and Proper Clause] is not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry out the specifically granted ‘foregoing’ powers of [Article I, Section 8] ‘and all other Powers vested by this Constitution....’”). But see Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2062–67 (2014) (arguing that the Necessary and Proper Clause is most accurately characterized as a separate enumerated power, even if “it is auxiliary rather than

implicitly, when a court addresses the outer limits of Congress’s power under, for example, the Commerce Clause, it necessarily considers the challenged statute’s validity under the Necessary and Proper Clause, as well.²³⁵ In a few cases, however, the Supreme Court has analyzed Congress’s power under the Necessary and Proper Clause independently from any specific enumerated power. Typically, these cases involve either multiple enumerated powers,²³⁶ or congressional actions that are many steps removed from the exercise of the underlying enumerated federal power.²³⁷ Because the extent of the Necessary and Proper Clause defines the outer reaches of Congress’s legislative powers, these cases delineate the boundary between the authority of the federal government and those areas reserved to the states by the Tenth Amendment.²³⁸

The Supreme Court’s 1819 opinion in *McCulloch v. Maryland* provides the canonical interpretation of the Necessary and Proper Clause.²³⁹ *McCulloch* resolved the then-controversial issue of whether Congress had the power to incorporate a national bank.²⁴⁰ Because the enumerated powers of Article I do not explicitly include the power to establish a bank, *McCulloch* addressed whether creating a national bank was a necessary and proper means of carrying out Congress’s powers “to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.”²⁴¹ The decision ultimately hinged on how broadly to construe the Necessary and Proper Clause. *McCulloch* emphatically rejected the argument that Congress’s implied powers under the clause are limited to those that are “indispensabl[e]” or “absolutely” necessary.²⁴² Rather, the Court held that “necessary” was better understood to mean “conducive to” or “needful.”²⁴³ As the Court concluded, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”²⁴⁴

primary”).

²³⁵ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 5 (2005) (addressing whether the prohibition of local use and cultivation of marijuana was necessary and proper to Congress’s power to regulate interstate commerce); *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (“If the treaty is valid there can be no dispute about the validity of the statute under Article 1, § 8, as a necessary and proper means to execute the powers of the Government.”).

²³⁶ See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (considering whether Congress’s powers “to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies” implied the power to establish a national bank under the Necessary and Proper Clause).

²³⁷ See, e.g., *United States v. Comstock*, 560 U.S. 126, 148 (2010) (considering whether “the enumerated power that justifies the creation of a federal criminal statute” further justifies indefinite civil commitment of a federal prisoner after the expiration of their criminal sentence).

²³⁸ See J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 584 (2002) (“Because the Necessary and Proper Clause delineates the outer boundary of congressional authority, interpretation of that provision also permits identification of reserved state powers.”); Stephen Gardbaum, *The Federalism Implications of Flores*, 39 WM. & MARY L. REV. 665, 682 (1998) (“[T]he Necessary and Proper Clause . . . operates at the boundaries of federal and reserved state power....”).

²³⁹ LaCroix, *supra* note 234, at 2061 (describing *McCulloch* as “the lodestar for understanding the [Necessary and Proper] clause”); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 814 (1996) (“Analysis of the Necessary and Proper Clause has historically begun and ended with *McCulloch*....”).

²⁴⁰ *McCulloch*, 17 U.S. (4 Wheat.) at 401.

²⁴¹ *Id.* at 406–07.

²⁴² *Id.* at 414–17.

²⁴³ *Id.* at 418.

²⁴⁴ *Id.* at 421.

Many federal laws rest on the foundation established by *McCulloch*'s broad interpretation of the Necessary and Proper Clause. For example, “the Necessary and Proper Clause provides the constitutional authority for most federal criminal statutes.”²⁴⁵ The Constitution expressly empowers Congress to punish only four crimes: counterfeiting, piracies, offenses against the law of nations, and treason.²⁴⁶ The rest of the federal criminal code—including prohibitions on tax evasion, racketeering, mail fraud, drug possession, and other crimes²⁴⁷—rests on a determination that criminalization is necessary to effectuate congressional power to regulate interstate commerce, collect taxes, establish post offices, spend for the general welfare, or some other enumerated federal power.²⁴⁸

Since *McCulloch*, the Supreme Court has continued to follow an expansive interpretation of the Necessary and Proper Clause, holding that the Clause permits any federal legislation that is “convenient” or “useful” to the exercise of federal power and is thereby “rationally related to the implementation of a constitutionally enumerated power.”²⁴⁹ The leading modern case interpreting the clause is *United States v. Comstock*. *Comstock* concerned a federal law providing for indefinite civil commitment of certain persons in federal custody who were shown to be “sexually dangerous,” even after those prisoners had served their federal sentences.²⁵⁰ The difficulty with the law, as a matter of congressional power, was that the offenders’ sexual dangerousness did not have an explicit tie to any specific enumerated federal power.²⁵¹ As the Court previously held in *United States v. Morrison*, Congress cannot regulate general sexual violence under the Commerce Clause.²⁵²

Comstock nonetheless upheld the civil commitment provision under the Necessary and Proper Clause. Writing for the majority, Justice Breyer held that whichever enumerated power justified the prisoner’s crime of conviction²⁵³ also permitted Congress “to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others,” including through post-sentence civil

²⁴⁵ *United States v. Comstock*, 560 U.S. 126, 156 (2010) (Alito, J., concurring in the judgment).

²⁴⁶ *See* U.S. CONST. art. I, § 8, cls. 6, 10; *id.* art. III, § 3, cl. 2.

²⁴⁷ *See, e.g.*, 18 U.S.C. §§ 1341–1351 (mail fraud and wire fraud); *id.* §§ 1951–1968 (racketeering); 21 U.S.C. § 844 (drug possession); 27 U.S.C. § 7201 (tax evasion).

²⁴⁸ *See Comstock*, 560 U.S. at 156 (Alito, J., concurring in the judgment) (“[M]ost federal criminal statutes rest upon a congressional judgment that, in order to execute one or more of the powers conferred on Congress, it is necessary and proper to criminalize certain conduct....”).

²⁴⁹ *Id.* at 133–34 (opinion of the Court) (citations omitted).

²⁵⁰ *Id.* at 130–31. For a fuller analysis of the *Comstock* decision, see CRS Report R40958, *United States v. Comstock: Legislative Authority Under the Necessary and Proper Clause*, by Charles Doyle.

²⁵¹ *See* 18 U.S.C. § 4247(a)(6) (defining a “sexually dangerous person” as one who “suffers from a serious mental illness ... as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released”).

²⁵² 529 U.S. 598, 617 (2000) (holding that Congress may not regulate “noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce”).

²⁵³ Notably, the civil commitment provisions applied to any person in federal custody, regardless of whether his conviction was for a sex-related crime or not. *See* 18 U.S.C. §§ 4247(a)(5), 4248(a). In practice, however, many of the individuals committed under the statute were in federal custody for a sex crime that fell within federal jurisdiction, such as possession of child pornography that “has been shipped or transported in or affecting interstate or foreign commerce ... by any means including by computer.” *See id.* § 2252(a)(2); *Comstock*, 560 U.S. at 131 (“Three of the five [petitioners] had previously pleaded guilty in federal court to possession of child pornography . . .”).

commitment.²⁵⁴ The Court concluded that the following five factors rendered the challenged law a valid exercise of Congress's Necessary and Proper Clause authority:

(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.²⁵⁵

A few years later, the Supreme Court reaffirmed *Comstock*'s broad reading of the Necessary and Proper Clause in *United States v. Kebodeaux*.²⁵⁶ *Kebodeaux* concerned another federal regulation of sex offenders: the registration requirements of SORNA.²⁵⁷ Anthony Kebodeaux, a member of the U.S. Air Force, was convicted by a court martial of a sex crime in 1999; he served a three-month sentence and received a bad conduct discharge.²⁵⁸ In 2007, Kebodeaux was convicted of violating SORNA when he moved from El Paso to San Antonio but failed to update his registration.²⁵⁹ Although Congress had not enacted SORNA until well after Kebodeaux's court martial and discharge, the Supreme Court upheld SORNA's application to Kebodeaux as necessary and proper to Congress's power to "make Rules for the ... Regulation of the land and naval Forces."²⁶⁰ Key to that conclusion was the Court's finding that Kebodeaux's release from federal custody was not "unconditional" because he was subject to an earlier federal statute, the Wetterling Act (P.L. 103-322, tit. XVII) which imposed "very similar" registration requirements to those of SORNA.²⁶¹ The Court explained that, as applied to Kebodeaux, the Wetterling Act was necessary and proper to Congress's power to regulate the military because it was imposed as part of Kebodeaux's original punishment by the court martial.²⁶² The Court thus framed the case as presenting a narrow question of whether Congress could later "modify" those registration requirements through SORNA.²⁶³ Applying the five *Comstock* factors discussed above, the Court found that the breadth of the Necessary and Proper Clause and the reasonableness of Congress's registration requirements justified SORNA's application to Kebodeaux.²⁶⁴

Though *Comstock* and *Kebodeaux* embrace a broad understanding of the Necessary and Proper Clause, Congress's powers under this provision are not unlimited. For example, as discussed in the "Regulating Activities that Substantially Affect Interstate Commerce" section above, the Supreme Court has held that federal laws forbidding gun possession near schools, creating a civil remedy for victims of gender-motivated violence, and compelling the purchase of health insurance are not necessary and proper to the exercise of Congress's power to regulate interstate commerce.²⁶⁵ In addition, the Court has explained its view that Congress may not rely on the

²⁵⁴ *Comstock*, 560 U.S. at 149.

²⁵⁵ *Id.*

²⁵⁶ 570 U.S. 387 (2013).

²⁵⁷ See 34 U.S.C. §§ 20911–20932; 18 U.S.C. § 2250(a).

²⁵⁸ *Kebodeaux*, 570 U.S. at 389–90.

²⁵⁹ *Id.* at 390.

²⁶⁰ U.S. CONST. art. I, § 8, cl. 14; *Kebodeaux*, 570 U.S. at 399.

²⁶¹ *Kebodeaux*, 570 U.S. at 391.

²⁶² *Id.* at 393.

²⁶³ *Id.* at 393–94.

²⁶⁴ See *id.* at 395–99.

²⁶⁵ See *supra* "Commerce Clause."

Necessary and Proper Clause to evade an “affirmative limitation” within an enumerated power, such as the Bankruptcy Clause’s requirement that federal bankruptcy laws be “uniform.”²⁶⁶

Even so, following *Comstock* and *Kebodeaux*, lower courts have generally been deferential to Congress’s power under the Necessary and Proper Clause. Many of these cases address various as-applied challenges to SORNA; the courts of appeals have repeatedly rejected such challenges, even when the defendant “neither served in the military, nor committed an offense or lived on federal property, nor moved within interstate or foreign commerce.”²⁶⁷ Courts have likewise relied on the Necessary and Proper Clause to uphold, for example, Congress’s power to criminalize hostage taking;²⁶⁸ exercise supplemental jurisdiction over state law claims;²⁶⁹ criminalize theft from organizations receiving federal funds;²⁷⁰ criminalize bribery of state and local officials receiving federal funds;²⁷¹ provide for the death penalty for federal crimes;²⁷² establish military commissions to try conspiracy to commit war crimes;²⁷³ and criminalize sexual abuse in federal prisons.²⁷⁴

Federalism Limitations Based on the Tenth and Eleventh Amendments

Along with the limitations derived from Congress’s enumerated powers, the Supreme Court has recognized federalism doctrines that affirmatively prohibit Congress from taking certain actions, even when Congress would otherwise be authorized to act under an enumerated power. Under these doctrines, an act of Congress may be unconstitutional “not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism.”²⁷⁵ The specific textual source of these doctrines is not always clear.²⁷⁶ The Court has

²⁶⁶ See *Siegel v. Fitzgerald*, 142 S. Ct. 1770, 1779 (2022) (quoting *Ry. Lab. Execs. Ass’n v. Gibbons*, 455 U.S. 457, 468–69 (1982)).

²⁶⁷ *United States v. Thompson*, 811 F.3d 717, 723 (5th Cir. 2016) (collecting cases). See also, e.g., *United States v. Brune*, 767 F.3d 1009, 1017 (10th Cir. 2014) (rejecting as-applied challenge to SORNA); *United States v. Coppock*, 765 F.3d 921, 925 (8th Cir. 2014) (same); *United States v. Elk Shoulder*, 738 F.3d 948, 957–59 (9th Cir. 2013) (same); *United States v. Carel*, 668 F.3d 1211, 1218–24 (10th Cir. 2011) (same).

²⁶⁸ See, e.g., *United States v. Mikhel*, 889 F.3d 1003, 1023–24 (9th Cir. 2018) (upholding Hostage Taking Act as necessary and proper to Congress’s Treaty Power); *United States v. Shubin*, 722 F.3d 233, 247 (4th Cir. 2013) (same); *United States v. Ferreira*, 275 F.3d 1020, 1027–28 (11th Cir. 2001) (same).

²⁶⁹ See *Artis v. Dist. of Columbia*, 138 S. Ct. 594, 606–07 (2018) (rejecting argument that tolling the statute of limitations for any state-law claim joined with a claim in federal court under supplemental jurisdiction would exceed Congress’s power under the Necessary and Proper Clause).

²⁷⁰ See *United States v. Edgar*, 304 F.3d 1320, 1325–27 (11th Cir. 2002) (upholding 18 U.S.C. § 666(a)(1) as necessary and proper to Congress’s Spending Power).

²⁷¹ See *Sabri v. United States*, 541 U.S. 600, 606 (2004) (upholding 18 U.S.C. § 666(a)(2) as necessary and proper to Congress’s Spending Power).

²⁷² *United States v. Aquart*, 912 F.3d 1, 57–60 (2d Cir. 2018).

²⁷³ *Al Bahlul v. United States*, 840 F.3d 757, 758 (D.C. Cir. 2016) (per curiam); see also *id.* at 761–62 (Kavanaugh, J., concurring).

²⁷⁴ *United States v. Mujahid*, 799 F.3d 1228, 1233–35 (9th Cir. 2015).

²⁷⁵ *Reno v. Condon*, 528 U.S. 141, 149 (2000).

²⁷⁶ See, e.g., *New York v. United States*, 505 U.S. 144, 156–57 (1992) (“The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself.... Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.”).

often described the doctrines as based on the general constitutional principles as confirmed by the Tenth Amendment²⁷⁷ (which reserves powers not granted to the federal government to the states or the people) or the Eleventh Amendment²⁷⁸ (which prevents federal courts from hearing certain lawsuits against states).

This section reviews three of these federalism doctrines: the anticommandeering doctrine,²⁷⁹ the Eleventh Amendment and state sovereign immunity,²⁸⁰ and the equal sovereignty doctrine.²⁸¹

The Anticommandeering Doctrine

As discussed above, Congress retains the power to *encourage* states and localities to adopt or enforce federal policies by paying them to do so pursuant to its Spending Clause authority.²⁸² The “anticommandeering” doctrine, however, generally prohibits the federal government from *requiring* states and localities to adopt or enforce federal policies.²⁸³ Much like the anti-coercion limitation on Congress’s spending power,²⁸⁴ the anticommandeering doctrine derives from the “fundamental structur[e]” of the Constitution, which “withholds from Congress the power to issue orders directly to the States” and reserves all legislative power not granted to Congress to the states via the Tenth Amendment.²⁸⁵

The anticommandeering doctrine has its origins in the Court’s 1992 decision in *New York v. United States*, which struck down a provision of a federal statute that required states to either (1) regulate low-level radioactive waste generated within their borders according to the instructions of Congress, or (2) take title to and possession of such waste.²⁸⁶ In striking down the provision, the Court reasoned that, in light of both the absence of an enumerated constitutional power to issue commands to state governments and the Tenth Amendment’s reservation of state sovereignty, Congress may not “commandeer” or “conscript” state governments into implementing federal policies by “directly compelling them to enact and enforce a federal regulatory program.”²⁸⁷ The Court explained that this limitation on Congress’s authority “follows from an understanding of the fundamental purpose served by our Government’s federal structure”

²⁷⁷ U.S. CONST. amend. X; *see generally* Cong. Rsch. Serv., *Overview of the Tenth Amendment, Rights Reserved to the States and the People*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt10-1/ALDE_00013619/ (last visited Oct. 28, 2022).

²⁷⁸ U.S. CONST. amend. XI; *see generally* Cong. Rsch. Serv., *Overview of the Eleventh Amendment, Suits Against States*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt11-1/ALDE_00013675/ (last visited Oct. 28, 2022).

²⁷⁹ *See infra* “The Anticommandeering Doctrine.”

²⁸⁰ *See infra* “The Eleventh Amendment and State Sovereign Immunity.”

²⁸¹ *See infra* “Equal Sovereignty Doctrine.”

²⁸² *See supra* “Spending Clause.”

²⁸³ *Printz v. United States*, 521 U.S. 898, 921, 929–30 (1997); *New York v. United States*, 505 U.S. 144, 175, 176–78 (1992).

²⁸⁴ *See supra* “The ‘Anti-Coercion’ Doctrine.”

²⁸⁵ *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. *See also* *NFIB v. Sebelius*, 567 U.S. 519, 578 (2012) (explaining that “the Constitution simply does not give Congress the authority to require the States to regulate,” which “is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own” (quoting *New York*, 505 U.S. at 178)) (opinion of Roberts, C.J.).

²⁸⁶ 505 U.S. at 174–78.

²⁸⁷ *Id.* at 175, 176–78 (internal quotation marks and citation omitted).

to “secure[] to citizens the liberties that derive from the diffusion of sovereign power.”²⁸⁸ The Court also reasoned that the anticommandeering doctrine is necessary to ensure political accountability because “[w]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”²⁸⁹

The Court again applied the anticommandeering doctrine five years later in *Printz v. United States*.²⁹⁰ In *Printz*, the Court struck down a provision of the Brady Handgun Violence Prevention Act (P.L. 103-159) that required state law enforcement officers to perform background checks on prospective gun purchasers.²⁹¹ In striking down the challenged provision, the Court concluded that Congress cannot require states to enforce or implement federal policies, even when the relevant federal legislation merely requires state officials to perform “discrete, ministerial tasks.”²⁹² As in *New York*, the Court explained that this principle follows from the Constitution’s “structural protections of liberty,” and that a contrary rule would diminish the political accountability of government officials.²⁹³ The Court also gestured toward a related but separate rationale for the anticommandeering doctrine, reasoning that allowing Congress to “forc[e] state governments to absorb the financial burden of implementing a federal regulatory program” would permit federal officials to “take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes.”²⁹⁴

The Supreme Court has explained that the anticommandeering doctrine recognized in *New York* and *Printz* has important limits. First, the Court has held that the doctrine “does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.”²⁹⁵ The Court invoked this exception to the anticommandeering doctrine in *Reno v. Condon*, where it rejected a Tenth Amendment challenge to a federal law that restricted the states’ ability to disclose personal information contained in their motor vehicle departments’ (DMVs’) records.²⁹⁶ The Court upheld the challenged law—which also restricted the ability of *private* actors to disclose personal information they obtained from state DMVs—because the law “regulate[d] the States as the owners of databases,” but did not impinge states’ “sovereign capacity to regulate their own citizens” by requiring the states to enact specific regulations or assist in the enforcement of federal statutes regulating private individuals.²⁹⁷

²⁸⁸ *Id.* at 181 (internal quotation marks and citation omitted).

²⁸⁹ *Id.* at 169.

²⁹⁰ *Printz v. United States*, 521 U.S. 898, 917, 925, 929 (1997).

²⁹¹ *Id.* at 935.

²⁹² *Id.* at 929.

²⁹³ *Id.* at 921, 929–30.

²⁹⁴ *Id.* at 930.

²⁹⁵ *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018).

²⁹⁶ 528 U.S. 141, 143–44, 151–52 (2000).

²⁹⁷ *Id.* at 151. In *Condon*, the Court relied in part on its 1988 decision in *South Carolina v. Baker*, which similarly rejected a Tenth Amendment challenge to a statute removing a federal tax exemption for interest earned on state and local bonds unless they were issued in registered (as opposed to bearer) form. 485 U.S. 505, 515 (1988). Operating under the assumption that the challenged law “effectively prohibit[ed] issuing [bearer] bonds,” the Court upheld the law on the grounds that it applied to both state governments and private corporations, and therefore did not “seek to control or influence the manner in which States regulate private parties.” *Baker*, 485 U.S. at 514.

Second, the anticommandeering doctrine does not prohibit Congress from requiring state *courts* to enforce federal causes of action.²⁹⁸ The Court arrived at this conclusion in its 1947 decision in *Testa v. Katt*, where it held that Rhode Island courts were required to enforce the federal Emergency Price Control Act (P.L. 77-421).²⁹⁹ The act established a cause of action against persons who sold certain goods above a prescribed price ceiling and provided that state courts shared concurrent jurisdiction with federal courts to adjudicate claims brought under the act.³⁰⁰ In *Testa*, the Court rejected the argument that Rhode Island courts were not required to enforce the act because it was the statute of another sovereign, explaining that under the Supremacy Clause, “the policy of the federal Act is the prevailing policy in every state.”³⁰¹ Accordingly, while the anticommandeering doctrine prohibits Congress from conscripting state legislatures and executive officials to adopt or enforce federal policy, it does not prevent Congress from requiring state courts to enforce federal causes of action.

Anticommandeering and Preemption

The anticommandeering doctrine is, as some courts have described, “intertwined”³⁰² with the concept of preemption, or the notion that Congress can displace (i.e., “preempt”) otherwise valid but conflicting state laws under the Supremacy Clause.³⁰³ Whether an act of Congress has a valid preemptive effect or instead impermissibly commandeers state legislatures had been difficult to discern.³⁰⁴ In general, so long as the federal law at issue “represent[s] the exercise of a power conferred on Congress by the Constitution,”³⁰⁵ and it regulates “individuals, not States,” the law

²⁹⁸ *Testa v. Katt*, 330 U.S. 386, 394 (1947).

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 387.

³⁰¹ *Id.* at 393.

³⁰² *Brackeen v. Haaland*, 994 F.3d 249, 298 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1205 (Feb. 28, 2022) (No. 21-376).

³⁰³ U.S. CONST. art. VI, cl. 2. (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (stating that “[a] fundamental principle of the Constitution is that Congress has the power to preempt state law”); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (noting that “we have long recognized that state laws that conflict with federal law are ‘without effect’”) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

³⁰⁴ See Edward A. Hartnett, *Distinguishing Permissible Preemption from Unconstitutional Commandeering*, 96 NOTRE DAME L. REV. 351, 351 (2020) (“For years, the preemption doctrine and the anticommandeering doctrine lived in an uneasy tension, with each threatening to consume the other.”).

³⁰⁵ *Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018). While the Court has not yet directly addressed Congress’s Fourteenth Amendment powers in its anticommandeering decisions, other decisions arguably suggest (and a number of commentators have assumed) that another “exception” to the anticommandeering doctrine exists in cases where Congress acts pursuant to its power to enforce the Fourteenth Amendment “by appropriate legislation.” See U.S. CONST. amend. XIV, § 5; *Milliken v. Bradley*, 433 U.S. 267, 291 (1977) (holding that the “Tenth Amendment’s reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment”); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that the Fourteenth Amendment grants Congress the authority to abrogate the Eleventh Amendment sovereign immunity of states on the grounds that, “when Congress acts pursuant to [Section 5 of the Fourteenth Amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority”); Daniel Hemel, *Murphy’s Law and Economics*, MEDIUM (May 16, 2018), <https://medium.com/whatever-source-derived/murphys-law-and-economics-3c0974e21ac8> (explaining that, under “a reasonable interpretation” of the Court’s anticommandeering cases, Congress can compel states to adopt and enforce federal policies when it is “acting pursuant to its authority under the Reconstruction Amendments”); Ronald D. Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*,

will have preemptive force and displaces any conflicting state laws.³⁰⁶ However, if the federal law directly commands the executive or legislative branch of a state government to act or refrain from acting in its “sovereign capacity to regulate [its] own citizens,” it violates the anticommandeering doctrine.³⁰⁷

Prior to the Supreme Court’s 2018 decision *Murphy v. NCAA*, some considered the distinction between permissible preemption and unconstitutional commandeering to be whether Congress told the states what they *could not* do, versus Congress telling the states what they *had* to do.³⁰⁸ In this situation, the “negative command was permissible preemption, while an affirmative command was impermissible commandeering.”³⁰⁹ However, in *Murphy*, the Supreme Court clarified that “[t]his distinction is empty” and that Congress may not issue direct orders to state legislatures regardless of whether Congress is commanding “affirmative” action by the states or imposing prohibitions on state conduct.³¹⁰

The Court in *Murphy* further considered the relationship between commandeering and preemption in its review of the federal Professional and Amateur Sports Protection Act of 1992 (PASPA; P.L. 102-559), which made it unlawful for most states to (among other things) “authorize by law” sports gambling.³¹¹ In 2014, New Jersey enacted a statute partially repealing its prohibition on sports gambling, allowing gambling to occur at most state casinos and racetracks, but maintaining restrictions on gambling (1) at other locations, (2) on New Jersey sporting events and collegiate teams, and (3) by persons under the age of 21.³¹² The National Collegiate Athletic Association (NCAA) and other sports leagues challenged the New Jersey law as an “authorization” of sports gambling that violated PASPA.³¹³ In response, New Jersey argued (among other things) that PASPA unconstitutionally commandeered state authority by prohibiting it from repealing its ban on sports gambling.³¹⁴

The Court sided with New Jersey and struck down PASPA’s prohibition of state “authorization” of sports gambling under the anticommandeering doctrine.³¹⁵ The Court concluded that this provision in PASPA was unconstitutional because it “unequivocally dictate[d] what a state legislature may and may not do,” and accordingly placed states “under the direct control of Congress.”³¹⁶ In arriving at this conclusion, the Court rejected the NCAA’s argument that PASPA’s “anti-authorization” provision represented a valid exercise of Congress’s power to

132 U. PA. L. REV. 289, 298–99 (1984) (discussing the proposition that the Tenth Amendment’s limitations on Congress’s authority do not apply when Congress legislates pursuant to its Fourteenth Amendment powers).

³⁰⁶ *Murphy*, 138 S. Ct. at 1479 (2018) (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)). The Constitution confers the power for Congress to regulate individuals, not states. Therefore, for a law to have preemptive effect, it must regulate “private actors.” *Id.* The Supreme Court has held, however, that a law can still carry preemptive effect if it regulates states that participate in an activity in which private parties engage. *See id.* at 1478–79 (“The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.”) (citing *Reno v. Condon*, 528 U.S. 141 (2000)).

³⁰⁷ *Condon*, 528 U.S. at 151.

³⁰⁸ *See Hartnett, supra* note 304, at 351.

³⁰⁹ *Id.*

³¹⁰ *Murphy*, 138 S. Ct. at 1478.

³¹¹ 28 U.S.C. § 3702(1).

³¹² *Murphy*, 138 S. Ct. at 1472.

³¹³ *Id.*

³¹⁴ *Id.* at 1478.

³¹⁵ *Id.*

³¹⁶ *Id.*

preempt state law.³¹⁷ The Court rejected this argument on the grounds that “valid preemption” occurs only when federal law is “best read as ... regulat[ing] private actors,” as opposed to state governments.³¹⁸ According to the Court, a federal statute is “best read as ... regulat[ing] private actors” when it “imposes restrictions or confers rights on private actors,” thereby preempting state laws that impose restrictions or confer rights that conflict with the federal statute.³¹⁹ Because PASPA’s “anti-authorization” provision did not “confer any federal rights on private actors interested in conducting sports gambling operations” or “impose any federal restrictions on private actors,” the Court concluded that it could not be interpreted “as anything other than a direct command to the States,” which the anticommandeering doctrine forbids.³²⁰ Thus, some have suggested that *Murphy* stands for the proposition that valid preemption requires Congress to enact a law “that imposes restrictions or confers rights on private actors.”³²¹ If a law confers rights or imposes restrictions on a private actor, any state laws that conflict with those rights or restrictions would be preempted by the federal law.³²² If the law is “merely a direct command to the states” it is unconstitutional commandeering.³²³

The Eleventh Amendment and State Sovereign Immunity

The Eleventh Amendment—which states that “the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State”—establishes additional limitations on the federal government’s power in relation to the states.³²⁴ Subject to certain exceptions discussed below, if a private litigant initiates a lawsuit against a state against that state’s wishes, the court must generally dismiss the case.³²⁵

The Eleventh Amendment implicates federalism because it limits the federal government’s ability to regulate the states by restricting Congress’s authority to enact statutes that subject states to suit.³²⁶ In the seminal 1890 case *Hans v. Louisiana*, the Supreme Court affirmed the principle that states generally enjoy immunity from private suits arising under federal statutory or constitutional law.³²⁷ Because judicial adjudication is the primary means by which the federal government may enforce its legal mandates, the Eleventh Amendment insulates states from many types of lawsuits to enforce federal laws and thus imposes significant constraints on the national government’s power with regard to the states.³²⁸

³¹⁷ *Id.* at 1479–81.

³¹⁸ *Id.* at 1479.

³¹⁹ *Id.* at 1480.

³²⁰ *Id.* at 1481.

³²¹ See Hartnett, *supra* note 304, at 393.

³²² *Id.*

³²³ *Id.*

³²⁴ U.S. CONST. amend. XI.

³²⁵ See, e.g., *Colby v. Herrick*, 849 F.3d 1273, 1281 (10th Cir. 2017) (“The Eleventh Amendment applies, foreclosing suit against the Division. Thus, the district court was right to dismiss the claims against the Division.”).

³²⁶ See, e.g., *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989), *superseded by statute*, Education of the Handicapped Act Amendments of 1990, P.L. 101-476, 104 Stat. 1103 (codified at 20 U.S.C. § 1403), (discussing “principles of federalism that inform Eleventh Amendment doctrine” (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984))).

³²⁷ 134 U.S. 1, 1–21 (1890).

³²⁸ See Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1123

The Court has interpreted the Eleventh Amendment against the broader background principle, inherent in the Constitution's structure, that the states, as separate and independent sovereigns, enjoy immunity from suit.³²⁹ Thus, although the Supreme Court has “sometimes referred to the States’ immunity from suit as ‘Eleventh Amendment immunity,’” that phrase is “something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.”³³⁰ As the Supreme Court has explained, “each State is a sovereign entity in our federal system,” and “it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the sovereign’s] consent.”³³¹ According to the Supreme Court, state sovereign immunity “serves two fundamental imperatives: safeguarding the dignity of the states and ensuring their financial solvency.”³³² As to the first of those two principles, the Court has stated that “making one sovereign appear against its will in the courts of” another sovereign—as would occur if a state were forced to litigate a case commenced against it in federal court—would impinge the former sovereign’s dignity.³³³ The doctrine of state sovereign immunity accordingly “confirms the sovereign status of the States by shielding them from suits by individuals absent their consent.”³³⁴ With regard to the second principle, the Supreme Court has emphasized that “the allocation of scarce resources among competing needs and interests lies at the heart of the political process.”³³⁵ The Court has therefore reasoned that granting “an unlimited congressional power to authorize suits” for monetary damages against the states “would pose a severe and notorious danger to the States and their resources” and thereby afford “Congress a power and a leverage over the States that is not contemplated by our constitutional design.”³³⁶

Because “the Eleventh Amendment is but one particular exemplification of” the broader principle of state sovereign immunity,³³⁷ the Supreme Court “has repeatedly held that the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment.”³³⁸ For instance, even though the text of the Eleventh Amendment would appear to apply only to federal courts adjudicating lawsuits against states filed by citizens of *another* state or a *foreign* state,³³⁹ the Supreme Court has nonetheless “extended the Amendment’s applicability to suits by

(2001) (opining that the Supreme Court’s Eleventh Amendment jurisprudence “frustrates judicial enforcement against the states of federal constitutional and legal norms”).

³²⁹ See, e.g., *Beaulieu v. Vermont*, 807 F.3d 478, 483 (2d Cir. 2015) (“The concept of state sovereign immunity encompasses different species of immunity. The Eleventh Amendment ... identifies a single species: immunity of a state’s treasury from claims for damages brought by private entities in federal court ... States also enjoy a broader sovereign immunity, which applies against *all* private suits, whether in state or federal court ... The Eleventh Amendment is but one particular exemplification of that immunity.”) (internal citations, quotation marks, and ellipses omitted).

³³⁰ *Alden v. Maine*, 527 U.S. 706, 713 (1999).

³³¹ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Hans*, 134 U.S. at 13).

³³² *Karns v. Shanahan*, 879 F.3d 504, 512 (3d Cir. 2018).

³³³ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (quoting *Emps. of Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J., concurring in the result)).

³³⁴ *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004).

³³⁵ *Alden*, 527 U.S. at 751.

³³⁶ *Id.* at 750.

³³⁷ E.g., *Beaulieu v. Vermont*, 807 F.3d 478, 483 (2d Cir. 2015).

³³⁸ See, e.g., *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 754 (2002).

³³⁹ See U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by *Citizens of another State, or by Citizens or Subjects of any Foreign State.*”) (emphasis added). See also, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (“By its terms the Amendment applies only to suits against a State by citizens of another State.”).

citizens against their *own* states.”³⁴⁰ Additionally, even though the text of the Eleventh Amendment could be read to prohibit only suits against the states themselves,³⁴¹ courts have interpreted the amendment to also preclude lawsuits against certain state officials and state agencies.³⁴² The Eleventh Amendment, however, does not protect municipal entities.³⁴³

Similarly, even though the text of the Eleventh Amendment purports to limit only the power of the *federal* courts,³⁴⁴ the Supreme Court has ruled that states also “retain immunity from private suit in their *own* courts.”³⁴⁵ According to the Court, “an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States” would undesirably give “Congress a power and a leverage over the States that is not contemplated by our constitutional design.”³⁴⁶ Relatedly, the Court has held that States retain their sovereign immunity from private suits brought in the courts of *other* States.³⁴⁷

Further, although the Eleventh Amendment’s text appears to constrain only the “*Judicial* power of the United States,”³⁴⁸ the Supreme Court has ruled that the doctrine of state sovereign immunity generally prohibits federal *administrative agencies* from adjudicating disputes against nonconsenting states.³⁴⁹

That is not to say, however, that states are categorically immune from suit. Even though courts have interpreted the Eleventh Amendment more broadly than its language would suggest in some ways, in other respects courts have interpreted the Eleventh Amendment more *narrowly* than its text would suggest. In other words, even though the Eleventh Amendment states that the federal judicial power “shall not be construed to extend to *any* suit ... commenced or prosecuted against one of the United States,”³⁵⁰ the Supreme Court has nonetheless recognized circumstances in which a court may validly adjudicate a lawsuit against a state.³⁵¹

³⁴⁰ *Garrett*, 531 U.S. at 363 (emphasis added).

³⁴¹ See U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted *against one of the United States* by Citizens of another State, or by Citizens or Subjects of any Foreign State.”) (emphasis added).

³⁴² See, e.g., *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997) (“It has long been settled that the reference to actions ‘against one of the United States’ encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities.”). As discussed below, courts have recognized exceptions where it is permissible to sue a state official in his official capacity in federal court.

³⁴³ See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

³⁴⁴ U.S. CONST. amend. XI (“The Judicial power *of the United States* shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States . . .”) (emphasis added). See also *Alden v. Maine*, 527 U.S. 706, 730 (1999) (stating that “the fact that the Eleventh Amendment by its terms limits only ‘the Judicial power of the United States’” does not delimit the Eleventh Amendment’s breadth).

³⁴⁵ *Alden*, 527 U.S. at 754 (emphasis added).

³⁴⁶ *Id.* at 750.

³⁴⁷ *Franchise Tax Bd. of State of Cal. v. Hyatt*, 139 S. Ct. 1485, 1492 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)).

³⁴⁸ U.S. CONST. amend. XI (emphasis added).

³⁴⁹ *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (“Simply put, if the Framers thought it an impermissible affront to a State’s dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency.... The affront to a State’s dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court.”).

³⁵⁰ See U.S. CONST. amend. XI (emphasis added).

³⁵¹ See *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997) (“[The text of the Eleventh Amendment] could suggest that the Eleventh Amendment ... is cast in terms of reach or competence, so that the federal courts are

First, the Supreme Court has recognized “that a State’s sovereign immunity is ‘a personal privilege which it may waive at pleasure.’”³⁵² Thus, a litigant may permissibly sue a state if that state has voluntarily “allow[ed] a federal court to hear and decide a case commenced or prosecuted against it.”³⁵³ Courts “will find a waiver” of a state’s Eleventh Amendment immunity “either if the State voluntarily invokes [the court’s] jurisdiction, or else if the State makes a clear declaration that it intends to submit itself to [the court’s] jurisdiction.”³⁵⁴ Significantly, the state’s “consent to suit against it” must “be unequivocally expressed.”³⁵⁵ The Supreme Court has therefore rejected the theory that a state may “‘impliedly’ or ‘constructively’” waive its sovereign immunity by merely engaging in a field of interstate commerce that Congress has deemed fit to regulate.³⁵⁶ However, under limited circumstances, Congress can incentivize a state to subject itself to suit by “requir[ing] a waiver of state sovereign immunity as a condition for receiving federal funds.”³⁵⁷ Congress must express its intent to condition the acceptance of federal funds on the waiver of sovereign immunity “expressly and unequivocally” in the text of the relevant statute.³⁵⁸ For example, because Congress has unambiguously required states to consent to suit under the Individuals with Disabilities Education Act (IDEA; P.L. 104-476)³⁵⁹ as a condition of receiving federal funds, several courts have ruled that private plaintiffs may sue certain state educational departments and school boards under the IDEA if the state has accepted federal financial assistance.³⁶⁰

Second, the Court has held that States may be sued if they “gave up their immunity from congressionally authorized suits pursuant to the ‘plan of the [Constitutional] Convention’ as part

altogether disqualified from hearing certain suits brought against a State. This interpretation, however, has been neither our tradition nor the accepted construction of the Amendment’s text.... The Amendment ... enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary’s subject matter jurisdiction.”). There are also other limited circumstances in which a litigant may hale a state into a federal court against its will that do not fit neatly within the exceptions discussed below. *See, e.g.*, *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 165–66 (1999) (reaffirming “that [t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts” to which the state is a party, even if the state objects to the Supreme Court adjudicating the case) (quoting *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990)); *California v. Deep Sea Rsch. Inc.*, 523 U.S. 491, 494–95 (1998) (“The Eleventh Amendment does not bar the jurisdiction of a federal court over an *in rem* admiralty action where the res is not within the State’s possession.”); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 32–33 (1994) (recognizing that multi-state entities created pursuant to compacts between states are ordinarily “not cloaked with the Eleventh Amendment immunity that a State enjoys” on its own).

³⁵² *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–87, 691 (1999) (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)).

³⁵³ *Coeur d’Alene Tribe*, 521 U.S. at 267.

³⁵⁴ *Coll. Sav. Bank*, 527 U.S. at 675–76 (internal citations omitted).

³⁵⁵ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (internal citations omitted).

³⁵⁶ *See Coll. Sav. Bank*, 527 U.S. at 675–76.

³⁵⁷ *E.g.*, *Fryberger v. Univ. of Ark.*, 889 F.3d 471, 473 (8th Cir. 2018) (quoting *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000)). *But see* *Hurst v. Tex. Dep’t of Assistive & Rehab. Servs.*, 482 F.3d 809, 811 (5th Cir. 2007) (“A state’s receipt of federal funds does not automatically constitute a waiver of its Eleventh Amendment immunity.”); *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 278 (5th Cir. 2005) (en banc) (applying “a five-prong test” to assess whether Congress had validly “condition[ed] the availability of federal funds on a state’s waiver of its Eleventh Amendment immunity”).

³⁵⁸ *Sossamon v. Texas*, 563 U.S. 277, 290 (2011).

³⁵⁹ *See* 20 U.S.C. § 1403.

³⁶⁰ *See, e.g.*, *Pace*, 403 F.3d at 275–89 (holding that, “when Louisiana accepted particular federal funds, it waived the immunity afforded it by the Eleventh Amendment to suits under ... the IDEA”); *A.W. v. Jersey City Pub. Schs.*, 341 F.3d 234, 236 (3d Cir. 2003) (holding that the New Jersey Department of Education and several of its officials had “waived any immunity from” claims under the IDEA “by the acceptance of federal financial assistance.”).

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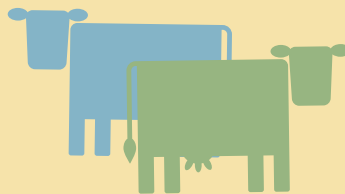
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of ‘the structure of the original Constitution itself.’”³⁶¹ In other words, congressional actions “do not offend state sovereignty if ‘the States consented’ to them ‘at the founding.’”³⁶² The Court has recognized these “structural waiver[s]” in suits between states³⁶³ and in suits by the United States against a state.³⁶⁴ The Court has also determined that when a federal power is “complete in itself” and the states “consented to exercise of that power—in its entirety—in the plan of the Convention,” that the states “implicitly agreed that their sovereignty ‘would yield to that of the Federal Government.’”³⁶⁵ Therefore, the states “accepted upon ratification that their ‘consent,’ including to suit, could ‘never be a condition precedent to’ Congress’ chosen exercise of its authority.”³⁶⁶ It follows then that, because the states have already consented to suit when Congress acts pursuant to one of these powers, the states “have no immunity left to waive or abrogate.”³⁶⁷ So far, the Court has recognized a “structural waiver” of state sovereign immunity in three congressional powers found in the Constitution: the Bankruptcy Clause,³⁶⁸ the federal eminent domain power,³⁶⁹ and the federal power to raise and support the Armed Forces.³⁷⁰

Third, in limited contexts, Congress may directly abrogate the states’ Eleventh Amendment immunity by statute.³⁷¹ However,

because abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States, and because States are unable directly to remedy a judicial misapprehension of that abrogation, the [Supreme] Court has adopted a particularly strict standard to evaluate claims that Congress has abrogated the States’ sovereign immunity.³⁷²

Thus, Congress may not “abrogate the States’ constitutionally secured immunity from suit in federal court” unless it has made its intention to do so “unmistakably clear in the language of the statute.”³⁷³ Under this reasoning, it is not enough for Congress to merely express an unequivocal intent to abrogate the states’ Eleventh Amendment immunity;³⁷⁴ Congress must also “act[]

³⁶¹ *Torres v. Texas Dep’t of Pub. Safety*, 142 S. Ct. 2455, 2460 (2022). *See also* *Alden v. Maine*, 527 U.S. 706, 730 (1999) (explaining that “States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been ‘a surrender of this immunity in the plan of the convention’”).

³⁶² *Torres*, 142 S. Ct. at 2462.

³⁶³ *Id.*; *see, e.g.*, *South Dakota v. North Carolina*, 192 U.S. 286 (1904).

³⁶⁴ *See, e.g.*, *United States v. Texas*, 143 U.S. 621 (1892). *See also* *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934) (explaining that the jurisdiction over such parties was established by the States’ “own consent and delegated authority as a necessary feature of the formation of a more perfect Union” and that, while the jurisdiction was not “conferred by the Constitution in express words, it is inherent in the constitutional plan”).

³⁶⁵ *Torres*, 142 S. Ct. at 2463.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).

³⁶⁹ *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244 (2021).

³⁷⁰ *Torres*, 142 S. Ct. at 2460.

³⁷¹ *See, e.g.*, *Nat’l Ass’n of Bds. of Pharmacy v. Bd. of Regents of Univ. Sys. of Ga.*, 633 F.3d 1297, 1312 (11th Cir. 2011) (“Sovereign immunity is no bar to a claim for damages when Congress validly abrogates the States’ sovereign immunity through legislation.”).

³⁷² *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) (internal citations and quotation marks omitted).

³⁷³ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), *superseded by statute*, Education of the Handicapped Act Amendments of 1990, P.L. 101-476, 104 Stat. 1103 (codified at 20 U.S.C. § 1403)).

³⁷⁴ *See, e.g., id.* at 67 (concluding that, even though the Age Discrimination in Employment Act “contain[ed] a clear

pursuant to a valid grant of constitutional authority” when it seeks to authorize suits against a state in federal court.³⁷⁵

The Supreme Court has ruled that only a few of the constitutional grants of legislative power discussed above³⁷⁶ provide a valid means for Congress to abrogate a state’s sovereign immunity. In other words, “even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment” nevertheless generally “prevents congressional authorization of suits by private parties against unconsenting States.”³⁷⁷ For instance, Congress typically cannot “base its abrogation of the States’ Eleventh Amendment immunity upon the powers enumerated in Article I” of the Constitution,³⁷⁸ such as the Commerce Clause³⁷⁹ or the Intellectual Property Clause.³⁸⁰ Nonetheless, states may have already *consented* to suit under some of Congress’s Article I powers through the “structural waivers” discussed above.

In addition, “Congress *may* authorize” litigants to sue a state in federal court “in the exercise of [Congress’s] power to enforce the *Fourteenth* Amendment.”³⁸¹ As discussed above,³⁸² the Fourteenth Amendment—which was “adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution”—“alter[ed] the pre-existing balance between state and federal power.”³⁸³ In particular, Section 5 grants Congress the “power to enforce, by appropriate legislation,”³⁸⁴ constitutional protections that expressly constrain the states.³⁸⁵ The Fourteenth Amendment therefore permits Congress to enact legislation that authorizes “private suits against States or state officials which” might be “constitutionally impermissible in other contexts.”³⁸⁶ Thus, for instance, the Supreme Court has concluded that Congress validly invoked the Fourteenth Amendment to abrogate the states’ Eleventh Amendment immunity from certain employment discrimination claims under the Civil Rights Act, or for violations of certain provisions of the Family and Medical Leave Act.³⁸⁷ As the text of Section 5 stipulates, however,

statement of Congress’s intent to abrogate the States’ immunity,” the attempted “abrogation exceeded Congress’ authority under § 5 of the Fourteenth Amendment”).

³⁷⁵ *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (quoting *Kimel*, 528 U.S. at 73).

³⁷⁶ See generally *supra* “Limitations on Congress’s Enumerated Powers.”

³⁷⁷ *Kimel*, 528 U.S. at 78 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996)).

³⁷⁸ *Garrett*, 531 U.S. at 364.

³⁷⁹ *E.g.*, *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 727 (2003) (“Congress may not abrogate the States’ sovereign immunity pursuant to its Article I power over commerce.”). See generally *supra* “Commerce Clause.”

³⁸⁰ See, e.g., *Allen v. Cooper*, 140 S. Ct. 994, 1002 (2020) (explaining that, “[h]ere too, the power to ‘secure’ an intellectual property owner’s ‘exclusive Right’ under Article I stops when it runs into sovereign immunity”). See also U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have power ... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”).

³⁸¹ *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999) (emphasis added).

³⁸² See *supra* “Congress’s Powers Under the Civil War Amendments.”

³⁸³ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65–66 (1996).

³⁸⁴ U.S. CONST. amend. XIV, § 5.

³⁸⁵ See *id.* § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”) (emphasis added). Accord *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976) (“The substantive provisions of [the Fourteenth Amendment] are by express terms directed at the States.”).

³⁸⁶ *Fitzpatrick*, 427 U.S. at 456.

³⁸⁷ *Id.* at 447; *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 740 (2003).

Congress may invoke the Fourteenth Amendment to abrogate a state’s immunity only if the statute abrogating that immunity qualifies as “appropriate legislation.”³⁸⁸

Finally, notwithstanding the Eleventh Amendment, federal courts may generally adjudicate lawsuits against individual state officers in their official capacity so long as the plaintiff seeks only prospective injunctive³⁸⁹ or declaratory³⁹⁰ relief to remedy continuing violations of federal statutory or constitutional law, as opposed to monetary damages.³⁹¹ Federal courts may entertain such lawsuits against state officials even though the state itself remains immune from suit.³⁹² This doctrine is known as the *Ex Parte Young* exception to Eleventh Amendment immunity, after the landmark Supreme Court case in which the doctrine originated.³⁹³ *Ex Parte Young* “is based on the notion, often referred to as ‘a fiction,’ that a State officer who” violates the U.S. Constitution or a federal statute “is ‘stripped of his official or representative character’” for Eleventh Amendment purposes.³⁹⁴ As a result, a lawsuit against that officer effectively constitutes a suit against an individual rather than the state itself.³⁹⁵ The Supreme Court has justified this legal fiction on the ground that “suits for declaratory or injunctive relief against state officers must ... be permitted if the Constitution is to remain the supreme law of the land.”³⁹⁶ *Ex Parte Young* thereby “ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law.”³⁹⁷

The Supreme Court has emphasized, however, that the *Ex Parte Young* exception “is narrow.”³⁹⁸ For one, *Ex Parte Young* applies only to suits against specific state officers in their official capacities;³⁹⁹ the doctrine “has no application in suits against the States and their agencies, which

³⁸⁸ See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000). For a discussion of the types of statutes that Congress may validly enact pursuant to Section 5 of the Fourteenth Amendment, see *supra* “Congress’s Powers Under the Civil War Amendments.”

³⁸⁹ “Injunctive relief” is judicially granted relief “that has the quality of directing or ordering; of, relating to, or involving an injunction.” BLACK’S LAW DICTIONARY (10th ed. 2014). An “injunction” is “a court order commanding or preventing an action.” *Id.*

³⁹⁰ “Declaratory relief” is a “request to a court to determine the legal status or ownership of a thing.” *Id.* A “declaratory judgment” is “a binding adjudication that establishes the rights and other legal relations of the parties.” *Id.*

³⁹¹ See, e.g., *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (“The Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law.”); *Green v. Mansour*, 474 U.S. 64, 68 (1985) (“The Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law.”); *Boler v. Earley*, 865 F.3d 391, 412 (6th Cir. 2017) (“The exception set forth in *Ex Parte Young* allows plaintiffs to bring claims for prospective relief against state officials sued in their official capacity to prevent future federal constitutional or statutory violations.”); *Balgowan v. New Jersey*, 115 F.3d 214, 217 (3d Cir. 1997) (“The *Ex Parte Young* exception has been interpreted by courts to allow suits against state officials for both prospective injunctive and declaratory relief. Although *Ex Parte Young*’s exact wording allows suits for prospective injunctive relief, the 1908 opinion was issued well before declaratory relief was available.”) (emphasis added; internal citations omitted). *But see* *Town of Barnstable v. O’Connor*, 786 F.3d 130, 138–39 (1st Cir. 2015) (emphasizing that “Congress may render the *Ex parte Young* exception inapplicable by ‘prescrib[ing] a detailed remedial scheme for the enforcement against a State of a statutorily created right’”) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996)).

³⁹² E.g., *Elephant Butte Irrigation Dist. of N.M. v. Dep’t of the Interior*, 160 F.3d 602, 608 (10th Cir. 1998) (stating that *Ex Parte Young* may apply “even if the state is immune”).

³⁹³ See *Ex Parte Young*, 209 U.S. 123 (1908).

³⁹⁴ *Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002) (quoting *Ex Parte Young*, 209 U.S. at 160).

³⁹⁵ *Id.* (quoting *Ex Parte Young*, 209 U.S. at 160).

³⁹⁶ *Alden v. Maine*, 527 U.S. 706, 747 (1999).

³⁹⁷ *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

³⁹⁸ *Id.* (internal citations omitted).

³⁹⁹ E.g., *Boler v. Earley*, 865 F.3d 391, 412 (6th Cir. 2017) (“The exception set forth in *Ex Parte Young* allows plaintiffs

are barred regardless of the relief sought.”⁴⁰⁰ Additionally, plaintiffs cannot take advantage of the *Ex Parte Young* exception if they seek any judicial remedy other than injunctive or declaratory relief.⁴⁰¹ Thus, *Ex Parte Young* does not authorize courts to “impose a liability which must be paid from public funds in the state treasury,”⁴⁰² such as monetary damages.⁴⁰³ Accordingly, “relief that in essence serves to compensate a party injured in the past ... is barred even when the state official is the named defendant.”⁴⁰⁴ Relatedly, plaintiffs may invoke *Ex Parte Young* only if they seek prospective rather than retrospective relief.⁴⁰⁵ In other words, *Ex Parte Young* permits a lawsuit against a state official only when “the relief ‘serves directly to bring an end to a present violation of federal law.’”⁴⁰⁶ Relief under *Ex Parte Young* may also be foreclosed if Congress has enacted a remedial scheme “specifically designed for enforcement of that right.”⁴⁰⁷ Finally, *Ex Parte Young* applies only when the plaintiff alleges that the defendant official is violating *federal* law (including constitutional and statutory violations).⁴⁰⁸ The exception “does not apply when a suit seeks relief under *state* law.”⁴⁰⁹

Equal Sovereignty Doctrine

In two recent voting rights cases, the Supreme Court has invoked the fundamental principle of equal sovereignty as a limitation on congressional power.⁴¹⁰ Because the United States “was and

to bring claims ... against *state officials sued in their official capacity.*”) (emphasis added). The Supreme Court has also concluded that the Eleventh Amendment does not bar suits against individual officers in their *personal* capacities pursuant to 42 U.S.C. § 1983, a federal statute that authorizes certain civil lawsuits against individual state officers predicated upon alleged violations of federal constitutional or statutory law. *Hafer v. Melo*, 502 U.S. 21, 31 (1991).

⁴⁰⁰ *P.R. Aqueduct*, 506 U.S. at 146.

⁴⁰¹ *E.g.*, *Mills v. Maine*, 118 F.3d 37, 54 (1st Cir. 1997) (“*Ex Parte Young* allows a way around the bar to federal jurisdiction erected by the Supreme Court’s Eleventh Amendment jurisprudence only in cases where prospective declaratory or injunctive relief is sought.”).

⁴⁰² *Hafer*, 502 U.S. at 30 (quoting *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)).

⁴⁰³ *E.g.*, *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (“Federal courts may not award ... money damages or its equivalent[] if the State invokes its immunity.”). The Eleventh Amendment, however, does not bar monetary sanctions payable out of the state treasury in *Ex Parte Young* actions. *Hutto v. Finney*, 437 U.S. 678, 691–92 (1978) (explaining that attorney’s fees imposed for bad faith (much like remedial fines for civil contempt) are not barred by “the substantive protections of the Eleventh Amendment”).

⁴⁰⁴ *Papasan v. Allain*, 478 U.S. 265, 278 (1986). That said, the Eleventh Amendment does not preclude “monetary relief that is ‘ancillary’ to injunctive relief.” *Kentucky v. Graham*, 473 U.S. 159, 169 n.18 (1985). “A court may enter a prospective injunction that costs the state money” as long as “the monetary impact is ... not the primary purpose of the suit.” *E.g.*, *Barton v. Summers*, 293 F.3d 944, 950 (6th Cir. 2002).

⁴⁰⁵ *E.g.*, *S & M Brands, Inc. v. Cooper*, 527 F.3d 500, 508 (6th Cir. 2008) (“The *Ex parte Young* exception does not, however, extend to any retroactive relief.”); *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003) (“Under the doctrine of *Ex parte Young*, suits against an official for prospective relief are generally cognizable, whereas claims for retrospective relief (such as damages) are not.”). Courts have acknowledged, however, that “the distinction between prospective and retroactive relief is not always easy to discern” in practice. *Armstead v. Coler*, 914 F.2d 1464, 1468 (11th Cir. 1990).

⁴⁰⁶ *Town of Barnstable v. O’Connor*, 786 F.3d 130, 138 (1st Cir. 2015) (quoting *Whalen v. Mass. Trial Ct.*, 397 F.3d 19, 29 (1st Cir. 2005)).

⁴⁰⁷ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74–76 (1996) (explaining that “where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state office based upon *Ex Parte Young*”).

⁴⁰⁸ *Papasan*, 478 U.S. at 277.

⁴⁰⁹ *E.g.*, *Doe v. Regents of Univ. of Cal.*, 891 F.3d 1147, 1153 (9th Cir. 2018) (emphasis added).

⁴¹⁰ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009); *Shelby Cnty. v. Holder*, 570 U.S. 529, 544 (2013).

is a union of states, equal in power, dignity and authority,”⁴¹¹ the equal sovereignty principle limits Congress’s ability to enact legislation that subjects different states to unequal burdens, at least without a sufficient justification.⁴¹²

Whether the equal sovereignty principle is based on the Tenth Amendment, or some other constitutional provision, is unclear from the Court’s cases. Although the Constitution explicitly mandates equal treatment of states in some particular contexts,⁴¹³ no provision of the Constitution explicitly requires Congress to treat states equally as a general matter.⁴¹⁴ In cases involving the admission of new states, the Supreme Court in the 19th century developed the “equal footing” doctrine,⁴¹⁵ which generally requires that Congress admit new states on equal terms with the original states.⁴¹⁶ That doctrine forbids Congress from imposing “restrictions upon a new state which deprive it of equality with other members of the Union.”⁴¹⁷ Until 2009, the applicability of that doctrine outside the state admission context was questionable, with the Court stating in the 1966 case *South Carolina v. Katzenbach* that “[t]he doctrine of the equality of States ... applies only to the terms upon which States are admitted to the Union.”⁴¹⁸

In *Northwest Austin Municipal Utility District Number One v. Holder*⁴¹⁹ and *Shelby County v. Holder*,⁴²⁰ the Court applied the equal sovereignty principle more broadly. Both cases concerned the constitutionality of Sections 4 and 5 of the Voting Rights Act of 1965 (VRA; P.L. 89-110). To remedy the racial discrimination in voting endemic during the Jim Crow era, Section 4 of the VRA contained a “coverage formula” identifying jurisdictions with a history of racial discrimination against voters, whereas Section 5 required those jurisdictions to obtain preclearance from the Department of Justice or a federal court before changing their voting procedures.⁴²¹ As a result, jurisdictions covered by Section 4 were subject to more stringent requirements when seeking to change their voting laws, compared to other states.

Although the Court upheld the constitutionality of this arrangement in *Katzenbach*,⁴²² *Northwest Austin* observed that the VRA’s preclearance requirements and coverage formula impose

⁴¹¹ *Shelby Cnty.*, 570 U.S. at 544 (citing *Coyle v. Smith*, 221 U.S. 559, 567 (1911)).

⁴¹² *Id.* at 542 (“[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” (quoting *Nw. Austin*, 557 U.S. at 203)).

⁴¹³ See, e.g., U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State... ”); U.S. CONST. art. I, § 8, cl. 1 (requiring “Duties, Imposts, and Excises” to be “uniform throughout the United States”); U.S. CONST. art. I, § 8, cl. 4 (requiring “an uniform Rule of Naturalization” and “uniform Laws on the subject of Bankruptcies throughout the United States”); U.S. CONST. art. I, § 9, cl. 6 (“No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.”).

⁴¹⁴ See generally Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1230–32 (2016); Thomas Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1099 (2016).

⁴¹⁵ See generally Cong. Rsch. Serv., *ArtIV.S3.C1.3.1 The Equal Footing Doctrine Generally*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIV-S3-C1-3-1/ALDE_00013710/ (last visited Nov. 8, 2022).

⁴¹⁶ *Pollard’s Lessee v. Hagan*, 44 U.S. 212, 223 (1845).

⁴¹⁷ *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

⁴¹⁸ *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966) (citing *Coyle*, 221 U.S. 559).

⁴¹⁹ 557 U.S. 193, 203 (2009).

⁴²⁰ 570 U.S. 529, 544 (2013).

⁴²¹ *Id.* at 537–38.

⁴²² *Katzenbach*, 383 U.S. at 328–83; accord *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, P.L. 97-205, § 2(b), 96 Stat. 131 (codified at 42 U.S.C. § 1973b); *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999).

“substantial ‘federalism costs’”⁴²³ that have become tougher to justify given improved voting conditions since 1965.⁴²⁴ The Court observed that the coverage formula, by differentiating between the states, departs from “the fundamental principle of equal sovereignty,” raising “serious constitutional questions.”⁴²⁵ Ultimately, however, the Court resolved *Northwest Austin* on statutory grounds.⁴²⁶

Four years later, *Shelby County* resolved the constitutional question left open in *Northwest Austin*, relying on the equal sovereignty principle to strike down the VRA’s coverage formula as unconstitutional.⁴²⁷ Under the test used in *Shelby County*, “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”⁴²⁸ The Court observed that in the nearly 50 years since the VRA was first upheld in *Katzenbach*, “things have changed dramatically,” pointing to increases in African American voter registration rates and turnout in covered jurisdictions.⁴²⁹ Unlike the “exceptional conditions” present in *Katzenbach*, the Court found that current conditions did not justify applying the preclearance formula to only certain states and counties.⁴³⁰

The Court has not decided an equal sovereignty challenge since *Shelby County*, so it remains unclear whether and how the doctrine will apply outside the voting rights context.⁴³¹ Since *Shelby County*, only a handful of federal courts have considered equal sovereignty challenges, and none has struck down a federal statute or action on those grounds.⁴³² In *Mayhew v. Burwell*, for example, the First Circuit considered an equal sovereignty challenge to a provision in the American Recovery and Reinvestment Act of 2009 (ARRA; P.L. 111-5) that offered stimulus funds to states that agreed to make no changes in their Medicaid coverage for 18- to 20-year-olds.⁴³³ Maine initially accepted the funds and provided Medicaid coverage to this group, but later determined that it wanted to change its policy.⁴³⁴ Maine argued that the ARRA provision locking its Medicaid coverage policy in place violated the equal sovereignty principle under *Shelby*

⁴²³ *Nw. Austin*, 557 U.S. at 202 (quoting *Lopez*, 525 U.S. at 282).

⁴²⁴ *Id.* at 202 (“Things have changed in the South.”), 203 (“[T]he statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.”).

⁴²⁵ *Id.* at 203–04.

⁴²⁶ *Id.* at 206–11.

⁴²⁷ *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013).

⁴²⁸ *Id.* at 542 (quoting *Nw. Austin*, 557 U.S. at 203).

⁴²⁹ *Id.* at 547–48.

⁴³⁰ *Id.* at 557.

⁴³¹ A number of federal appeals courts have declined to extend *Shelby County* to contexts outside of voting rights, such as the exercise of congressional power under the Thirteenth Amendment, absent a clearer indication from the Court. *See, e.g.*, *United States v. Diggins*, 36 F.4th 302, 317 (1st Cir. 2022); *United States v. Roof*, 10 F.4th 314, 394 (4th Cir. 2021); *United States v. Cannon*, 750 F.3d 492, 505 (5th Cir. 2014).

⁴³² *See, e.g.*, *New York v. Yellen*, 15 F.4th 569, 584 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 1669 (2022) (rejecting claim that cap on federal tax deduction for state and local taxes violated the principle of equal sovereignty); *NCAA v. Governor of N.J.*, 730 F.3d 208, 239 (3d Cir. 2013) (rejecting equal sovereignty challenge to a congressional regulation of gambling that exempted Nevada, and questioning whether “the equal sovereignty principle applies in the same manner in the context of Commerce Clause legislation”), *abrogated on other grounds by* *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

⁴³³ 772 F.3d 80, 83–84 (1st Cir. 2014).

⁴³⁴ *Id.* at 84.

County because it could not adopt a policy that other states had adopted, resulting in “disparate treatment.”⁴³⁵

The First Circuit distinguished *Shelby County* and concluded that ARRA, unlike the VRA’s coverage formula, did not involve unequal treatment of states by Congress.⁴³⁶ The court explained that in the VRA cases, the formula defining the covered jurisdictions had been admittedly “reverse engineered” to target certain jurisdictions, singling out particular states for disfavored treatment.⁴³⁷ By contrast, the rule in ARRA was applied uniformly: “Congress came up with the criteria without regard to which states would be covered by their application.”⁴³⁸ The First Circuit also determined that the equal sovereignty doctrine applied only in “extraordinary situations,” such as the VRA, involving a “sensitive area of state and local policymaking.”⁴³⁹ The ARRA’s condition on Medicaid coverage did not, in the appellate court’s view, involve such an area.⁴⁴⁰ Alternatively, the First Circuit explained that any differential treatment of states was sufficiently related to valid legislative purposes, as compared to the “decades-old data and eradicated practices” used to justify the VRA’s coverage formula.⁴⁴¹ As *Mayhew* and other lower court decisions reflect, federal courts have largely limited the application of the equal sovereignty doctrine to the voting rights context.

Conclusion

Whether based on interpretations of Congress’s enumerated powers, the Tenth and Eleventh Amendments, or more general constitutional principles, the Supreme Court has established a number of federalism-based doctrines that constrain Congress’s authority. Congress may wish to consider these federalism-based limitations when legislating, to try to ensure that its enactments comport with the Constitution and are less susceptible to judicial challenges.

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⁴³⁵ *Id.* at 93–94.

⁴³⁶ *Id.* at 94.

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.* at 94–95.

⁴⁴⁰ *Id.* at 95.

⁴⁴¹ *Id.* at 96.

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